



**Mammoth Lakes Housing Board Meeting  
Agenda**

**Monday, January 23, 2023, 6:00 p.m.  
437 Old Mammoth Road, Suite Z, Mammoth Lakes**

Members of the Board

President Kirk Stapp, Vice President Jennifer Kreitz, Board Member Lindsay Barksdale, Board Member Tom Hodges, Board Member Tony Perkins, Board Member Heidi Steenstra, Board Member Brian D'Andrea, Board Member Sarah Nuttall

NOTE: In compliance with the Americans with Disabilities Act, if you need special assistance to participate in this meeting, please contact Mammoth Lakes Housing, Inc. at (760) 934-4740. Notification 48 hours prior to the meeting will enable Mammoth Lakes Housing, Inc to make arrangements to ensure accessibility to this meeting (28 CFR 13.102-35.104 ADA Title II).

NOTE: This meeting will be conducted pursuant to the provisions of Assembly Bill 361 (AB361) which amends certain requirements of the Ralph M. Brown Act. You are encouraged to watch this meeting live through the online eSCRIBE system here: <https://pub-townofmammothlakes.escribemeetings.com>, on the local government cable channel 18, or by utilizing the Zoom link below.

**ZOOM INFORMATION:**

Join from a PC, Mac, iPad, iPhone or Android device: <https://monocounty.zoom.us/j/98707718059>

Or join by phone:

Dial(for higher quality, dial a number based on your current location):

US: +1 669 900 6833 or +1 346 248 7799 or +1 253 215 8782 or +1 646 876 9923 or +1 301 715 8592 or +1 312 626 6799

Webinar ID: 987 0771 8059 - Callers: To Raise your hand Press \*9, to Unmute/Mute Press \*6

International numbers available: <https://monocounty.zoom.us/j/98707718059>

You can watch this meeting live through the online Granicus system here:

[http://mammothlakes.granicus.com/ViewPublisher.php?view\\_id=4](http://mammothlakes.granicus.com/ViewPublisher.php?view_id=4) or on the local government cable channel 18. Public comments can be submitted to the Executive Director at [patricia@mammothlakeshousing.org](mailto:patricia@mammothlakeshousing.org) or [clerk@townofmammothlakes.ca.gov](mailto:clerk@townofmammothlakes.ca.gov) or may be made via Zoom or in person in Suite Z.

**1. Call to Order**

Regular meeting of the public benefit corporation, 501(c)3, Mammoth Lakes Housing, Inc. whose mission is to support affordable housing for a viable economy and sustainable community.

**2. Assembly Bill 361 (AB 361) Findings**

**2.1 Adopt Resolution 2023-01 to allow virtual Board meetings to continue during the Covid-19 pandemic declared emergency**

**3. Public Comments**

This is the established time for any member of the public wishing to address the Mammoth Lakes Housing, Inc. Board of Directors on any matter that does not otherwise appear on the agenda. Members of the public desiring to speak on a matter appearing on the agenda should ask the Chairman for the opportunity to be heard when the item comes up for consideration. Public comments may be submitted to the Executive Director at [patricia@mammothlakeshousing.org](mailto:patricia@mammothlakeshousing.org) or [clerk@townofmammothlakes.ca.gov](mailto:clerk@townofmammothlakes.ca.gov) before or during the meeting, may be made in person in Suite Z or by "Raising your hand" in Zoom.

**4. CONSENT AGENDA**

**4.1 Approve the minutes from the regular December 5, 2022 Board meeting**

**5. POLICY ITEMS**

**5.1 Appoint Amanda Rice to the Mammoth Lakes Housing, Inc. Board of Directors as the Town of Mammoth Lakes' Town Council Representative**

**5.2 Present Agnes Vianzon with a Certificate of Appreciation for her service on the Mammoth Lakes Housing Board of Directors from 2018 – 2022**

**5.3 Present President Kirk Stapp with an award for 20 years of service with Mammoth Lakes Housing, Inc.**

**5.4 The Board will elect a new President**

**5.5 The Board will elect a new Vice President**

**5.6 The Board will elect a new Treasurer**

**5.7 The Board will receive an update on the COVID-19 public health emergency Brown Act amendments (AB 361) ending February 28, 2023**

**5.8 The Board will receive an update regarding the Project Homekey, Innsbruck Lodge Affordable Housing project and discuss additional funding options**

- 5.9 The Board will consider authorizing the rehabilitation contract for Innsbruck Lodge with Christian Hansen Construction in an amount not to exceed \$2,384,928**
  
- 5.10 Approval of Mammoth Lakes Housing, Inc. Resolution 23-02 Approving the Creation of an Executive Director Evaluation Process Ad-Hoc Committee to bring recommendations to the Board of Directors**
  
- 5.11 Appointment of the members to the Executive Director Evaluation Process Ad-Hoc Committee**
  
- 5.12 MLH Annual Report / Impact Statement 2021-2022**
  
- 5.13 MLH Programs Update**
  
- 5.14 5-Year Strategic Plan Update proposed planning process**
  
- 6. Committee Reports**
  
- 7. Board Member Reports**
  
- 8. Adjourn**



*Mammoth Lakes Housing, Inc.  
supports workforce housing  
for a viable economy and  
sustainable community.*

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## **STAFF REPORT**

Subject: The Board will discuss AB 361 and consider adoption of Resolution 23-01, regarding the continued utilization of teleconferencing for meetings of the Board that are required to follow the Brown Act.

Presented by: Patricia Robertson, Executive Director

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## **BACKGROUND**

On June 11, 2021, Governor Gavin Newsom issued Executive Order N-08-21, which among other things rescinded his prior Executive Order N-29-20 and sets a date of October 1, 2021 for public agencies to transition back to public meetings held in full compliance with the Brown Act.

That date is February 28, 2023.

**In September the Governor signed AB 361 which extends public meeting teleconferencing until January 1, 2024. This allows for the continued use of teleconferencing without the need to publicly notice the address of every teleconference location.**

Brief summary of AB 361 Changes:

For as long as a Brown Act body uses the modified Brown Act rules authorized by AB 361, it must:

1. Give notice of the meeting and post agendas as otherwise required by the Brown Act.
2. Allow members of the public to access the meeting and address the legislative body directly (this doesn't mean in-person).
3. Give notice explaining how members of the public may access the meeting and offer public comment.
4. Identify and include an opportunity for all persons to attend via phone or internet on the agenda.
5. Conduct meetings in a manner that protects the statutory and constitutional rights of the parties and the public.
6. Take no action on items on the agenda in the event there is an interruption which prevents remote members of the public from commenting, until connection is restored [THIS IS NEW].

7. Provide an opportunity for the public to address the board and offer comment in real time from their location.
8. Even though public agencies cannot require the public to “register” prior to providing comment, if they use a website or other platform that requires registration and it is not under the agency’s control, that is acceptable.

New requirements for public comment:

1. If the agency provides a timed public comment period for each agenda item, it may not close the public comment period for the agenda item (or the opportunity to register, pursuant to paragraph 8 above) to provide public comment until that timed public comment period has elapsed.
2. An agency that does not provide a timed public comment period, but takes public comment separately on each agenda item, shall allow a reasonable amount of time per agenda item to allow public members the opportunity to provide public comment, including time for members of the public to register, or otherwise be recognized for the purpose of providing public comment.
3. An agency that provides a timed general public comment period that does not correspond to a specific agenda item shall not close the public comment period or the opportunity to register, until the timed general public comment period has elapsed.

Required Findings:

No later than 30 days after teleconferencing for the first time under AB 361 (and every 30 days thereafter) the board must make the following findings by majority vote:

- (A) The legislative body has reconsidered the circumstances of the state of emergency.\*
- (B) Any of the following circumstances exist:
  - i. The state of emergency continues to directly impact the ability of the members to meet safely in person.
  - ii. State or local officials continue to impose or recommend measures to promote social distancing.

\* “state of emergency” means a state of emergency proclaimed pursuant to Section 8625 of the California Emergency Services Act (Article 1 (commencing with Section 8550) of Chapter 7 of Division 1 of Title 2).

Because the Mammoth Lakes Housing Board of Directors meets monthly (or less frequently), the Board will need to make the required findings at the beginning of every Board meeting.

The California Department of Public Health (CDPH) has updated information on their website here: <https://www.cdph.ca.gov/>.

Mono County Public Health issued an order on August 6, 2021 requiring masking in all public indoor spaces. In a letter dated September 20, 2021, Mono County Public Health Director

recommended that the Board of Supervisors continue virtual meetings (Attachment 1). The Mono County Public Health Order requiring masks is provided as Attachment 2.

**RECCOMENDATION**

The Board should consider making the required findings to continue with virtual meetings.

**ATTACHMENTS**

1. Letter from Bryan Wheeler, Director of Public Health, to the Mono County Board of Supervisors, dated September 20, 2021
2. The Mono County Public Health Order requiring masks, August 6, 2021
3. Resolution 23-01



# MONO COUNTY HEALTH DEPARTMENT

## Public Health

P.O. BOX 476, BRIDGEPORT, CA 93517 PHONE (760) 932-5580 • FAX (760) 932-5284  
P.O. BOX 3329, MAMMOTH LAKES, CA 93546 PHONE (760) 924-1830 • FAX (760) 924-1831

To: Board of Supervisors

From: Bryan Wheeler, Director of Public Health

Date: September 20, 2021

Re: Continued Recommendation regarding Social Distancing and Remote Meetings

Both Mono County “covering” Health Officer Dr. Rick Johnson and I strongly recommend that physical/social distancing measures continue to be practiced throughout our Mono County communities, including at meetings of the Board of Supervisors, to minimize the spread of COVID-19.

Whether vaccinated or not, positive individuals are contracting the Delta variant and infecting others in our communities. Social distancing and masking are crucial mitigation measure to prevent the disease’s spread. Virtual board meetings allow for the participation of the community, county staff, presenters, and board members in a safe environment, with no risk of contagion. It is recommended that the board implement 100% remote meetings.

As a secondary alternative, the board could implement hybrid meetings (i.e., meetings that are both in-person and virtual), combined with adequate social distancing measures and masking requirements that are actively enforced, in order to minimize risk of contagion. However, as noted above, the safest path would be to implement meetings that are solely remote.

If you have any questions regarding this recommendation, please do not hesitate to contact me. I will be present at the September 21, 2021, meeting to answer any questions.

# MONO COUNTY HEALTH DEPARTMENT

## Public Health Officer Order:

### Face Coverings For All While in Public

P.O. BOX 3329, MAMMOTH LAKES, CA 93546 PHONE (760) 924-1830 • FAX (760) 924-1831

EMAIL RJOHNSON@ALPINECOUNTY.CA.GOV

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**August 6, 2021**

Please read this Order carefully. Violation of or failure to comply with this Order is a crime punishable by fine of up to \$1,000, imprisonment for up to 90 days, or both. (California Health and Safety Code § 120295.) **This Order supersedes and replaces all previous Mono County Public Health Officer Orders regarding Face Coverings.**

WHEREAS, a state of emergency has been declared by the State of California, and a local emergency has been declared in Mono County in response to the virus COVID-19 (Coronavirus); and

WHEREAS, on June 15, 2021, California fully reopened the economy, and the State terminated the restrictions on businesses and activities in its Blueprint for a Safer Economy. Epidemiologic evidence demonstrates that the rate of community transmission of COVID-19 and positivity rates have all substantially increased since the June 15, 2021 reopening; and

WHEREAS, since the state reopening, increased interactions among members of the public have resulted in an increased number of daily new COVID-19 cases in Mono County; daily cases have more than quadrupled since June 15, 2021. In addition, as of July 24, 2021, Mono County is reporting a 7-day daily average case rate of 15.3 cases per 100,000 people with a 7-day lag. Based upon Federal Centers for Disease Control and Prevention (CDC) indicators and thresholds, this means that community transmission of COVID-19 within Mono County is now considered Substantial, and highly likely to increase during the coming days and weeks; and

WHEREAS, while a significant number of Mono County residents are fully vaccinated (i.e., two weeks or more have passed after the receipt of a second dose in a 2-dose series or 2 weeks or more after receipt of a single-dose vaccine) as of the date of this Order in Mono County, COVID-19 remains a concern to public health and safety and there are still a large number of individuals in the County who are not yet fully vaccinated, including children under 12 years old, who are not currently eligible to be vaccinated. Furthermore, variants of the virus that may spread more easily and/or cause more severe illness, including the Delta variant, are present in Mono County, impacting local residents and visitors, based on positive case reporting; and

WHEREAS, throughout the COVID-19 pandemic, in Mono County, as well as throughout California and the nation, there have been insufficient quantities of critical healthcare infrastructure, including hospital beds, ventilators and workers, capable of adequately treating mass numbers of patients at a single time as the virus spread unchecked; and



WHEREAS, in order to continue to protect the community from COVID-19, in particular for those who are not fully vaccinated, this Order mainly aligns with the State Public Health Officer Order, dated June 11, 2021, as well as the July 28, 2021, Guidance on the Use of Face Coverings issued by the California Department of Public Health. The primary intent of this Order is to help slow and improve the Substantial level of community transmission here in Mono County, to align with recent State recommendations and to help mitigate and reduce the impact on Mono County, and its critical healthcare infrastructure; and

WHEREAS, throughout the COVID-19 pandemic, face coverings have been recommended by the U.S. Centers for Disease Control and Prevention (CDC) to decrease COVID-19 transmission. Face coverings are believed to decrease shedding of COVID-19 by people who are infected. Many people with COVID-19 infection have mild or even no symptoms. Such cases may unknowingly spread the virus to others and face coverings are intended to decrease the chance of such transmission.

**NOW, THEREFORE**, effective beginning August 6, 2021, under the authority of California Health and Safety Code sections 101040, 101085 and 120175 and Title 17 California Code of Regulations, Section 2501, the Mono County Acting Health Officer **HEREBY ORDERS** as follows:

1. All persons within Mono County and the Town of Mammoth Lakes, regardless of vaccination status, shall wear face coverings<sup>1</sup> **while in indoor public settings, venues, gatherings, and businesses** (examples include offices, retail, restaurants, theaters, family entertainment centers and meetings, among others).
2. Individuals, businesses, venue operators, or hosts of public indoor settings must require all patrons to wear masks, for all indoor settings, regardless of their vaccination status, and post clearly visible and easy to read signage at all entry points to communicate the masking requirements for patrons.
3. Recommendation: It is *recommended* that all persons wear face coverings while attending large outdoor public events.
4. The following individuals are exempt from wearing masks:
  - a. Persons younger than two years old. Very young children must not wear a mask because of the risk of suffocation.

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<sup>1</sup> The following list, informed by the California Department of Public Health <https://www.cdph.ca.gov/Programs/CID/DCDC/Pages/COVID-19/Get-the-Most-out-of-Masking.aspx> and the Center for Disease Control <https://www.cdc.gov/quarantine/masks/mask-travel-guidance.html> are attributes of face coverings, or masks, needed to fulfill the requirements of this Order:

- A properly worn mask that completely covers the nose and mouth.
- Cloth masks should be made with two or more layers of a breathable fabric that is tightly woven (i.e., fabrics that do not let light pass through when held up to a light source).
- Mask should be secured to the head with ties, ear loops, or elastic bands that go behind the head.
- Mask should fit snugly but comfortably against the side and bottom of the face.
- Mask should be a solid piece of material without slits, exhalation valves, or punctures.

- b. Persons with a medical condition, mental health condition, or disability that prevents wearing a mask. This includes persons with a medical condition for whom wearing a mask could obstruct breathing or who are unconscious, incapacitated, or otherwise unable to remove a mask without assistance.
- c. Persons who are hearing impaired, or communicating with a person who is hearing impaired, where the ability to see the mouth is essential for communication.
- d. Persons for whom wearing a mask would create a risk to the person related to their work, as determined by local, state, or federal regulators or workplace safety guidelines.

This Order shall take effect beginning on Friday, August 6, 2021 and will remain in effect until rescinded, in writing, by the Mono County Health Officer based on three consecutive weeks of adjusted case of below 6.9 per 100,000.

### **General Provisions**

1. This Order is issued as a result of the worldwide pandemic of COVID-19 disease, also known as “novel coronavirus,” which has infected at least 197 million individuals worldwide in 220 countries and is implicated in over 4.2 million worldwide deaths, including 1065 cases and five deaths in Mono County.

2. This Order is issued based on evidence of increasing transmission of COVID-19 both within the County of Mono and worldwide, scientific evidence regarding the most effective approach to slow transmission of communicable diseases generally and COVID-19 specifically, as well as best practices as currently known and available to protect the public from the risk of spread of or exposure to COVID-19.

3. This Order is intended to reduce the likelihood of exposure to COVID-19, thereby slowing the spread of COVID-19 in Mono County as well as, on a larger scale, to communities worldwide. As the presence of individuals increases, the difficulty and magnitude of tracing individuals who may have been exposed to a case rises exponentially.

4. This Order is issued in accordance with, and incorporates by reference, the: March 4, 2020 Proclamation of a State Emergency issued by Governor Gavin Newsom; the March 15, 2020 Declaration of Local Health Emergency based on an imminent and proximate threat to public health from the introduction of novel COVID-19 in Mono County; the March 17, 2020 Resolution of the Board of Supervisors of the County of Mono proclaiming the existence of a Local Emergency in the County of Mono regarding COVID-19 and ratifying and extending the Declaration of Local Health Emergency due to COVID-19; all current applicable guidance issued by the California Department of Public Health, including but not limited to the June 11, 2021 California Public Health Officer Order and the July 28, 2021 California Department of Public Health Guidance for the Use of Face Coverings, and the Center for Disease Control recommendations on masking protocol.

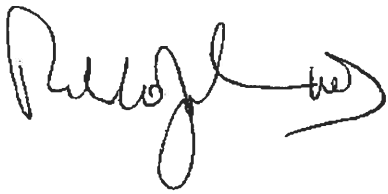
5. This Order is made in accordance with all applicable State and Federal laws, &

including but not limited to: Health and Safety Code sections 101030, et seq.; Health and Safety Code sections 120100, et seq.; and Title 17 of the California Code of Regulations section 2501.

6. To the extent necessary, pursuant to Government Code sections 26602 and 41601 and Health and Safety Code section 101029, the Health Officer requests that the Sheriff and all Chiefs of Police in the County ensure compliance with and enforcement of this Order.

7. This Order is made because of the propensity of the virus to spread person-to-person.

8. Copies of this Order shall promptly be posted on the County of Mono's Public Health Department's website (monohealth.com) and provided to any member of the public requesting a copy of this Order.

A handwritten signature in black ink, appearing to read 'Richard Johnson', with a stylized flourish at the end.

\_\_\_\_\_ Date: August 2, 2021

Richard Johnson, MD  
Acting Local Health Officer  
For Mono County and the Town of Mammoth Lakes

## **RESOLUTION NO. 23-01**

### **A RESOLUTION OF THE BOARD OF DIRECTORS OF MAMMOTH LAKES HOUSING, INC. MAKING FINDINGS TO ALLOW THE BOARD OF DIRECTORS TO MEET VIRUTALLY DURING THE COVID-19 PANDEMIC DECLARED EMERGENCY**

**WHEREAS**, meetings of the Mammoth Lakes Housing, Inc.'s Board of Directors are conducted in compliance with the Brown Act (Government Code Section 54950 et seq), so that members of the public may attend, observe, and participate, in accordance with the organizations' Bylaws (Section 5.2.(c)); and

**WHEREAS**, Government Code Section 54953(e) is a provision of the Brown Act establishing special rules that apply under specific circumstances to meetings that are conducted remotely via teleconference; and

**WHEREAS**, using the special rules will facilitate continuing to conduct meetings remotely during the COVID-19 pandemic; and

**WHEREAS**, the Board of Directors of Mammoth Lakes Housing, Inc. does hereby find that allowing for conducting public meetings virtually will support social distancing and reduce the potential risk to the public, elected officials, and employees to be infected by or to spread COVID-19; and

**WHEREAS**, a required condition for the use of the Section 54953(e) rules is the existence of a state of emergency declared by the Governor pursuant to Government Code Section 8625, proclaiming the existence of conditions of disaster or of extreme peril to the safety of persons and property within the State caused by conditions as described in Government Code Section 8558; and

**WHEREAS**, an additional required condition is that state or local officials have imposed or recommended measures to promote social distancing, or, the legislative body meeting in person would present imminent risks to the health and safety of attendees; and

**WHEREAS**, the Governor of California declared a Statewide state of emergency due to the COVID-19 virus on Wednesday, March 4, 2020; and

**WHEREAS**, on March 15, 2020 the Mono County Health Officer declared a local health emergency, including finding "that there is an imminent and proximate threat to public health from the introduction of COVID-19 in Mono County;" and

**WHEREAS**, the Mono County Director of Public Health has recently issued a memorandum recommending that social distancing be used as one means of reducing the spread of COVID-19; and

**WHEREAS**, the Board of Directors does hereby find that meetings of the Mammoth Lakes Housing, Inc. Board shall be conducted in compliance with paragraph (3) of subdivision (b) of Government Code Section 54953, as

authorized by subdivision (e) of Section 54953, and that the Board of Directors shall comply with the requirements to provide the public with access to the meetings as prescribed in paragraph (2) of subdivision (e) of Section 54953.

**NOW, THEREFORE, BE IT RESOLVED** that the recitals set forth above are true and correct and are incorporated into this resolution by this reference; and

**IT IS FURTHER RESOLVED** that the Board of Directors hereby declares that a State and County emergency exists due to the existence or threatened existence of conditions of disaster or of extreme peril to the safety of persons and property due to the COVID-19 virus; and

**IT IS FURTHER RESOLVED** that the Mono County Director of Public Health has issued a memorandum recommending the continued use of social distancing as a means to reduce the spread of COVID-19, and that the COVID-19 state of emergency impacts the ability of the Board of Directors to safely meet in person; and

**IT IS FURTHER RESOLVED** that the Board of Directors finds the use of virtual meetings, as provided for under AB 361 as approved by the State Legislature and signed by the Governor, is a prudent and safe means to conduct the organization's business respecting the recommendation to use social distancing as a precaution to reduce the spread of COVID-19; and

**IT IS FURTHER RESOLVED** that the organization's staff and Board of Directors are hereby authorized and directed to take all actions necessary to carry out the intent and purpose of this Resolution including conducting open and public meetings in accordance with Government Code section 54953(e) and other applicable provisions of the Brown Act; and

**IT IS FURTHER RESOLVED** that this Resolution shall take effect immediately upon its adoption and shall be effective until the earlier of (i) February 28, 2023, or such time the Board of Directors adopts a subsequent resolution in accordance with Government Code section 54953(e)(3) to extend the time during which the Board of Directors may continue to teleconference without compliance with paragraph (3) of subdivision (b) of section 54953.

**APPROVED AND ADOPTED THIS 23<sup>rd</sup> day of January 2023.**

AYES: \_\_\_\_\_ NAYS: \_\_\_\_\_ ABSTAIN: \_\_\_\_\_ ABSENT: \_\_\_\_\_

\_\_\_\_\_  
Kirk Stapp, President

ATTEST:

\_\_\_\_\_  
Patricia Robertson, Secretary



## **Mammoth Lakes Housing Board**

### **Regular Meeting Minutes**

**December 5, 2022, 6:00 p.m.**

**437 Old Mammoth Road, Suite Z, Mammoth Lakes**

Members Present: President Kirk Stapp, Vice President Jennifer Kreitz, Board Member Lindsay Barksdale, Board Member Tom Hodges, Board Member Tony Perkins, Board Member Brian D'Andrea, Board Member Sarah Nuttall

Members Absent: Board Member Agnes Vianzon, Board Member Heidi Steenstra

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#### **1. Call to Order**

President Kirk Stapp called the meeting to order at 6:04 p.m. in the Council Chambers at 437 Old Mammoth Road, Ste. Z, Mammoth Lakes, CA. President Stapp, Vice President Jennifer Kreitz, and Board Members Lindsay Barksdale and Tom Hodges attended the meeting in person, the rest of the members of the Board attended the meeting via videoconference.

#### **2. Assembly Bill 361 (AB 361) Findings**

##### **2.1 Adopt Resolution 2022-26 to allow virtual Board meetings to continue during the Covid-19 pandemic declared emergency**

Moved by Board Member Tom Hodges

Seconded by Vice President Jennifer Kreitz

Adopt Resolution 2022-26 to allow virtual Board meetings to continue during the Covid-19 pandemic declared emergency.

For (6): President Kirk Stapp, Vice President Jennifer Kreitz, Board Member Lindsay Barksdale, Board Member Tom Hodges, Board Member Tony Perkins, and Board Member Brian D'Andrea

Absent (3): Board Member Agnes Vianzon, Board Member Heidi Steenstra, and Board Member Sarah Nuttall

Carried (6 to 0)

**3. Public Comments**

Executive Director Patricia Robertson requested that Item number 5.12 be moved to immediately follow Item number 5.7.

**4. Consent Agenda**

Moved by Vice President Jennifer Kreitz  
Seconded by Board Member Tom Hodges

Approve the Consent Agenda.

For (6): President Kirk Stapp, Vice President Jennifer Kreitz, Board Member Lindsay Barksdale, Board Member Tom Hodges, Board Member Tony Perkins, and Board Member Brian D'Andrea

Absent (3): Board Member Agnes Vianzon, Board Member Heidi Steenstra, and Board Member Sarah Nuttall

Carried (6 to 0)

**4.1 Approve the Minutes from the November 7, 2022 Regular Board Meeting**

**5. Policy Matters**

**5.1 The Board will receive an update on the COVID-19 public health emergency Brown Act amendments (AB 361) ending February 28, 2023**

Executive Director Patricia Robertson outlined the information in the letter provided by MLH Legal Counsel Rafael Yaquian and Nazanin Salehi.

Board Member Sarah Nuttall joined the meeting via videoconference at 6:14 p.m.

There was discussion between Ms. Robertson and members of the Board.

**5.2 Review and approve the MLH and Sierra Housing Advocates, LLC Fiscal Year 2021-22 Fourth Quarter Draft Financial Statements**

Executive Director Patricia Robertson outlined the information in the MLH and Sierra Housing Advocates, LLC Fiscal Year 2021-22 Fourth Quarter Draft Financial Statements.

There was discussion between Ms. Robertson and members of the Board.

Moved by Vice President Jennifer Kreitz

Seconded by Board Member Lindsay Barksdale

Approve the MLH and Sierra Housing Advocates, LLC Fiscal Year 2021-22 Fourth Quarter Draft Financial Statements with edits as discussed.

For (7): President Kirk Stapp, Vice President Jennifer Kreitz, Board Member Lindsay Barksdale, Board Member Tom Hodges, Board Member Tony Perkins, Board Member Brian D'Andrea, and Board Member Sarah Nuttall

Absent (2): Board Member Agnes Vianzon, and Board Member Heidi Steenstra

Carried (7 to 0)

**5.3 Adopt Resolution 2022-27 to apply for funding through the Portfolio Reinvestment Program in an amount not to exceed \$5,000,000 for the Valley Apartments preservation project in Bishop, CA**

Executive Director Patricia Robertson outlined the information in Resolution 2022-27, which would allow MLH to apply for funding through the Portfolio Reinvestment Program in an amount not to exceed \$5,000,000 for the Valley Apartments preservation project in Bishop, CA.

There was discussion between Ms. Robertson and members of the Board.

Moved by Board Member Tom Hodges

Seconded by President Kirk Stapp

Adopt Resolution 2022-27 to apply for funding through the Portfolio Reinvestment Program in an amount not to exceed \$5,000,000 for the Valley Apartments preservation project in Bishop, CA.



For (7): President Kirk Stapp, Vice President Jennifer Kreitz, Board Member Lindsay Barksdale, Board Member Tom Hodges, Board Member Tony Perkins, Board Member Brian D'Andrea, and Board Member Sarah Nuttall

Absent (2): Board Member Agnes Vianzon, and Board Member Heidi Steenstra

Carried (7 to 0)

**5.4 Adopt Resolution 2022-28 to allow the Valley Apartments Affordable Housing, LLC to participate in an application for funding through the Portfolio Reinvestment Program in an amount not to exceed \$5,000,000 for the Valley Apartments preservation project in Bishop, CA**

Executive Director Patricia Robertson outlined the information in Resolution 2022-28 which would allow the Valley Apartments Affordable Housing, LLC to participate in an application for funding through the Portfolio Reinvestment Program in an amount not to exceed \$5,000,000 for the Valley Apartments preservation project in Bishop, CA.

There was discussion between Ms. Robertson and members of the Board.

Moved by Board Member Brian D'Andrea  
Seconded by Board Member Tom Hodges

Adopt Resolution 2022-28 to allow the Valley Apartments Affordable Housing, LLC to participate in an application for funding through the Portfolio Reinvestment Program in an amount not to exceed \$5,000,000 for the Valley Apartments preservation project in Bishop, CA.

For (7): President Kirk Stapp, Vice President Jennifer Kreitz, Board Member Lindsay Barksdale, Board Member Tom Hodges, Board Member Tony Perkins, Board Member Brian D'Andrea, and Board Member Sarah Nuttall

Absent (2): Board Member Agnes Vianzon, and Board Member Heidi Steenstra

Carried (7 to 0)

**5.5 Adopt Resolution 2022-29 authorizing a loan extension for Loan No. 19-PDLP-14481 (CA Housing & Community Development), a predevelopment loan for Silver Peaks**

Executive Director Patricia Robertson outlined the information in Resolution 2022-29 which would allow MLH to accept the loan modification of the Predevelopment Loan Program (PDLP) loan as presented, and authorize the Executive Director to execute any related documents on behalf of Silver Peaks Affordable Housing, LLC (MLH sole member and partner to Silver Peaks LP).

There was discussion between Ms. Robertson and members of the Board.

Moved by Vice President Jennifer Kreitz

Seconded by President Kirk Stapp

Adopt Resolution 2022-29 to accept the loan modification of the Predevelopment Loan Program (PDLP) loan as presented, and authorize the Executive Director to execute any related documents on behalf of Silver Peaks Affordable Housing, LLC (MLH sole member and partner to Silver Peaks LP).

For (7): President Kirk Stapp, Vice President Jennifer Kreitz, Board Member Lindsay Barksdale, Board Member Tom Hodges, Board Member Tony Perkins, Board Member Brian D'Andrea, and Board Member Sarah Nuttall

Absent (2): Board Member Agnes Vianzon, and Board Member Heidi Steenstra

Carried (7 to 0)

**5.6 Adopt Resolution 2022-30 authorizing a loan extension for Loan No. 6316-SP-01 (Rural Community Assistance Corporation), a predevelopment loan for Silver Peaks**

Executive Director Patricia Robertson outlined the information in Resolution 2022-30 which would allow MLH to accept the loan modification of Rural Community Assistance Corporation (RCAC) loan as presented, and authorize the Executive Director to execute any related documents on behalf of Silver Peaks Affordable Housing, LLC (MLH sole member and partner to Silver Peaks LP) .

There was discussion between Ms. Robertson and members of the Board.

Moved by Vice President Jennifer Kreitz

Seconded by Board Member Tom Hodges

Adopt Resolution 2022-30 to accept the loan modification of Rural Community Assistance Corporation (RCAC) loan as presented, and authorize the Executive Director to execute any related documents on behalf of Silver Peaks Affordable Housing, LLC (MLH sole member and partner to Silver Peaks LP).

For (7): President Kirk Stapp, Vice President Jennifer Kreitz, Board Member Lindsay Barksdale, Board Member Tom Hodges, Board Member Tony Perkins, Board Member Brian D'Andrea, and Board Member Sarah Nuttall

Absent (2): Board Member Agnes Vianzon, and Board Member Heidi Steenstra

Carried (7 to 0)

**5.7 The Board will receive an update regarding the Project Homekey, Innsbruck Lodge Affordable Housing project**

Executive Director Patricia Robertson outlined the information in the staff report.

There was discussion between Ms. Robertson and members of the Board.

**5.8 The Board will consider the merits of an application to the CA Coalition for Rural Housing Rural West Internship Program for Diversity in Nonprofit Housing and Community Development**

Executive Director Patricia Robertson outlined the information in the staff report.

There was discussion between Ms. Robertson and members of the Board.

Staff was given direction to not submit an application for an intern through the California Coalition for Rural Housing West (CCRHRW) Internship Program this year and instead focus their efforts on filling the open Housing Navigator position.

**5.9 The Board will receive a presentation on the 20th Anniversary Rebranding**

Executive Director Patricia Robertson outlined the information in the Rebranding presentation.

There was discussion between Ms. Robertson and members of the Board.

Staff was given direction to use the Board's feedback regarding the color palette presented this evening to finalize the logo.

**5.10 MLH Programs Update**

Executive Director Patricia Robertson outlined the information in the staff report. Ms. Robertson announced that she had received a letter of resignation from Board Member Agnes Vianzon today.

There was discussion between Ms. Robertson and members of the Board.

**5.11 Reschedule regularly scheduled January Board meeting**

Executive Director Patricia Robertson reported that the January 2, 2023 meeting fell on a paid holiday and would need to be rescheduled.

There was discussion between Ms. Robertson and members of the Board.

CONSENSUS: There was consensus to hold the January meeting on January 23, 2023.

**5.12 Consider approval of demolition contract for 913 Forest Trail, Project Homekey site with Christian Hansen in the amount of \$62,312**

This item was taken out of order.

Executive Director Patricia Robertson outlined the information in the staff report.

There was discussion between Ms. Robertson and members of the Board.

Moved by Board Member Tom Hodges

Seconded by President Kirk Stapp

Delegate Authority to Executive Director Patricia Robertson to negotiate a demolition only contract with Christian Hansen Construction, Inc. for 913 Forest Trail, Project Homekey site, in an amount in accordance with the amount listed in the staff report.

For (7): President Kirk Stapp, Vice President Jennifer Kreitz, Board Member Lindsay Barksdale, Board Member Tom Hodges, Board Member Tony Perkins, Board Member Brian D'Andrea, and Board Member Sarah Nuttall

Absent (2): Board Member Agnes Vianzon, and Board Member Heidi Steenstra

Carried (7 to 0)

## **6. Committee Reports**

Board Member Tony Perkins reported that although the Executive Director Evaluation Committee comprised of himself, Board Member Brian D'Andrea, and Board Member Sarah Nuttall was listed as disbanded in the agenda packet, they had met to discuss potential modifications to the Executive Director Evaluation process going forward.

There was discussion between Executive Director Patricia Robertson and members of the Board.

CONSENSUS: There was consensus from the Board to add an item to the January meeting to discuss potential modifications to the annual Executive Director Evaluation process.

## **7. Board Member Reports**

Vice President Jennifer Kreitz thanked President Kirk Stapp for his recent service as the Town Council appointed representative on the MLH Board as well as his prior time on the Board as a member at large. Ms. Kreitz reported that the Mono County Board of Supervisors had an item on their agenda tomorrow to consider allowing Recreational Vehicles (RVs) as housing in certain land use designations. She said that the County had planned a Housing Workshop this month, however, their Housing Coordinator was no longer with the County, so it had been postponed until January. She said that she served on the National Association of Counties (NACo) Housing Task Force and gave an update on an event they held in Washington, DC recently. Ms. Kreitz thanked Executive Director Patricia Robertson for speaking at the California State Association of Counties (CSAC) annual conference recently at Disneyland. She said that the new legislative cycle had started at the State level today and reported that there was a bill being considered which would create a one stop shop for affordable housing, as well as a potential local housing allocation grant.

Board Member Tom Hodges reported that Mammoth Mountain Ski Area (MMSA) had a strong start to the ski season, and said that November was a record month for visitations. Mr. Hodges said that MMSA expected a bullish season which would bode well for Transient Occupancy Tax (TOT) collections, which were part of discretionary funding for the Town Council to allocate and possibly more funding for housing as a result.

There was discussion between Ms. Robertson and members of the Board.

**8. Adjourn**

The meeting was adjourned at 8:20 p.m.

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Angela Plaisted, Assistant Clerk  
Town of Mammoth Lakes

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Patricia Robertson, Secretary  
Mammoth Lakes Housing, Inc.



*Mammoth Lakes Housing, Inc.  
supports workforce housing  
for a viable economy and  
sustainable community.*

---

## **STAFF REPORT**

Subject: Appoint Amanda Rice to the Mammoth Lakes Housing, Inc. Board of Directors as the Town of Mammoth Lakes' Town Council Representative

Presented by: Patricia Robertson, Executive Director

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## **BACKGROUND**

Mammoth Lakes Housing, Inc. was created in 2003 through a partnership with the Town of Mammoth Lakes and Intrawest to create affordable, workforce housing.

Section 4.7(c) of the organization's Bylaws state that:

*Two directors shall be elected officials from the Town of Mammoth Lakes and the County of Mono. Specifically, the directors shall consist of one member of the Town Council and one member of the Mono County Board of Supervisors.*

This structure is unique and is not commonly found in other nonprofit housing organizations or other local organizations that have contracts for services with the Town or County such as MLTPA or the Mammoth Lakes Chamber of Commerce.

## **ANALYSIS**

Amanda Rice was elected to the Mammoth Lakes Town Council after the November 2022 election. She was appointed to serve on the MLH Board as the Town Council representative at their regular meeting on January 4, 2023.

Kirk Stapp was previously appointed as the Town Council representative. He will continue to serve on the MLH Board as a member at large.

## **RECCOMENDATION**

Staff recommends that the Board appoint Amanda Rice as the Town of Mammoth Lakes' Town Council Representative.



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sustainable community.*

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## **STAFF REPORT**

Subject: Present Agnes Vianzon with a Certificate of Appreciation for her service on the Mammoth Lakes Housing Board of Directors from 2018 – 2022

Presented by: Patricia Robertson, Executive Director

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## **BACKGROUND**

Agnes Vianzon was appointed to the Mammoth Lakes Housing Board of Directors in 2018.

Agnes brought her experience with nonprofit administration, diverse perspective, and critical thinking abilities to the Board of Directors during her four-year tenure. She actively participated in many committees including the marketing committee during the 20<sup>th</sup> Anniversary Rebranding project, as well as the Town Contract committee. Her contributions have greatly improved our work at MLH.

## **NEXT STEPS**

The organizations' Bylaws state that “the authorized number of directors shall be up to nine (9), but not less than six (6) (§4.3). With the current nine (9) directors, the organization meets all Bylaw requirements.

## **RECOMENDATION**

Staff recommends that the Board approve a motion to present Agnes with a Certificate of Appreciation for her contributions to the organization.

## **ATTACHMENTS**

1. Letter of Resignation
2. Certificate of Appreciation



## Patricia Robertson

---

**From:** Agnes Vianzon ESCC <agnes@easternsierracc.org>  
**Sent:** Monday, December 5, 2022 1:04 PM  
**To:** Patricia Robertson  
**Subject:** Resignation from MLH Board of Directors

Dear Patricia,

Regrettfully, I'm writing to give my formal notice that I am resigning from the board of directors for Mammoth Lakes Housing.

Unfortunately, being able to maintain availability to MLH meetings has not materialized despite my greatest hopes. It has been an honor and pleasure to serve for the last 3+ years.

I'm incredibly grateful for the opportunities I've been provided working with you and along side the other board members. It's been a wonderful experience to see the growth MLH has had during this time as well as the numerous opportunities on the horizon.

Thank you for all your passion and dedication to the mission of Mammoth Lakes Housing. I wish you all the best, and look forward to keeping in touch.

Sincerely,  
Agnes Vianzon



**Agnes Vianzon (she/they)**  
Founder & Executive Director, Eastern Sierra Conservation Corps

760.935.3877 | [www.easternsierracc.org](http://www.easternsierracc.org)

[agnes@easternsierracc.org](mailto:agnes@easternsierracc.org)



---

Create your own [email signature](#)

# Certificate of Appreciation

Presented to

**Agnes Vianzon**

---

*For your four years of service on the Board of Directors of Mammoth Lakes Housing, Inc.  
and ongoing support of low-income and marginalized populations in the Eastern Sierra.*



**2018 - 2022**

---

Kirk Stapp, President

---

Patricia Robertson, Executive Director



*Mammoth Lakes Housing, Inc.  
supports workforce housing  
for a viable economy and  
sustainable community.*

---

## **STAFF REPORT**

Subject: Present President Kirk Stapp with an award for 20 years of service with Mammoth Lakes Housing, Inc.

Presented by: Patricia Robertson, Executive Director

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## **BACKGROUND**

Kirk Stapp is a founding Board Member of Mammoth Lakes Housing, Incorporated.

The idea for a community benefit nonprofit organization dedicated to local workforce housing became reality between 2002 and 2003.

Mr. Stapp has been with the organization through both highs and lows, and has provided critical leadership through these achievements in our service area covering Inyo, Mono, and Alpine counties:

- 82 affordable rental homes
- 1 transitional housing unit
- 48 affordable ownership homes
- Leveraging nearly \$62 million in grants and bonds for housing development, programs, emergency assistance, etc.
- 118 affordable rental units *currently in process*

For his forward-thinking, commitment to our local workforce, and unwavering leadership, we are presenting President Stapp with an award recognizing his achievements over the past twenty years.



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for a viable economy and  
sustainable community.*

---

**STAFF REPORT**

Subject: The Board will elect a President

Presented by: Patricia Robertson, Executive Director

---

**BACKGROUND**

The MLH Bylaws state that Officers of the Board shall be determined at a regular meeting.

The current President is Kirk Stapp.

**Section 6.8 President**

The president shall preside at meetings of the Board and shall exercise and perform such other powers and duties as may from time to time be assigned to the president by the Board. Subject to control of the Board, and to the extent the Corporation does not have an employee of the Corporation serving as the general manager, then the president shall be the general manager of the Corporation and shall supervise, direct, and control the Corporation's activities, affairs, and offers.

**RECOMMENDATION**

The Board should nominate and appoint a President via a motion.



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---

## **STAFF REPORT**

Subject: The Board will elect a Vice President

Presented by: Patricia Robertson, Executive Director

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## **BACKGROUND**

The MLH Bylaws state that Officers of the Board shall be determined at a regular meeting.

The current Vice President is Jennifer Kreitz.

### **Section 6.9 Vice President**

If the President is absent or disabled, the vice president, if any, in order of their rank as fixed by the Board, or, if not ranked, a vice president designated by the Board, shall perform all duties of the President. When so acting, a vice president shall have all powers of and be subject to all restrictions on the president. The vice president shall have such other powers and perform such other duties as the Board, or these Bylaws may prescribe.

## **RECOMMENDATION**

The Board should nominate and appoint a Vice President via a motion.



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## **STAFF REPORT**

Subject: The Board will elect a Treasurer

Presented by: Patricia Robertson, Executive Director

---

## **BACKGROUND**

The MLH Bylaws state that Officers of the Board shall be determined at a regular meeting.

The current Treasurer is Tom Hodges.

### **Section 6.12 Treasurer**

- (a) The treasurer shall keep and maintain, or cause to be kept and maintained, adequate and correct books and accounts of the Corporation's funds, properties, and transactions. The treasurer shall send or cause to be given to the directors such financial statements and reports as are required to be given by law, these Bylaws, or the Board. The books of account shall be open to inspection by any director at all reasonable times during the business hours of the Corporation.
- (b) The treasurer shall deposit, or cause to be deposited, all money and other valuables in the name and to the credit of the Corporation with such depositories as the Board may designate; shall disburse the Corporation's funds as the Board may order; shall render to the president and the Board, when requested, an account of all transactions and other financial condition of the Corporation; and shall have such other powers and perform such other duties as the Board or the Bylaws may prescribe.
- (c) Nothing in the Section shall be deemed to prohibit the Corporation from causing and employee of the Corporation to assist the treasurer in the performance of the duties set forth above, or otherwise performing such duties in conjunction with the treasurer.

## **RECOMMENDATION**

The Board should nominate and appoint a Treasurer via a motion.

M David Kroot

Lynn Hutchins

Karen M. Tiedemann

Thomas H. Webber

Dianne Jackson McLean

Robert C. Mills

Isabel L. Brown

James T. Diamond, Jr.

Margaret F. Jung

Heather J. Gould

William F. DiCamillo

Amy DeVaudreuil

Barbara E. Kautz

Rafael Yaquián

Celia W. Lee

Dolores Bastian Dalton

Joshua J. Mason

Jeffrey A. Streiffer

Elizabeth R. Klueck

Jhaila R. Brown

Gabrielle B. Janssens

Rye P. Murphy

Marc A. Bentzen

Benjamin Funk

Aileen T. Nguyen

Katie Dahlinghaus

Matthew S. Heaton

Nazanin Salehi

Erin C. Lapeyrolerie

Minda Bautista Hickey

Connor T. Kratz

December 5, 2022

memorandum

To

Board of Directors of Mammoth Lakes Housing, Inc.

From

Rafael Yaquian

Nazanin Salehi

RE

Remote Appearances Pursuant to Brown Act

I. Question Presented

Mammoth Lakes Housing, Inc. (the "MLH") asked for a memorandum detailing how recent changes to the Ralph M. Brown Act, Government Code Section 54950 *et seq* (the "Brown Act") would impact remote participation by members of MLH's governing body (the "Board of Directors").

As detailed in this Memorandum, the flexibility to conduct remote meetings under AB 361 is anticipated to expire February 28, 2023. Under recently adopted legislation, AB 2449, members of the Board of Directors will have the ability to participate remotely under very limited circumstances. Nonetheless, remote participation in Board of Directors meetings in compliance with pre-existing authority under the Brown Act is still available so long as MLH adheres to the remote participation noticing rules described below.

II. Existing Law

*MLH is subject to the Brown Act as a "legislative body" under Gov't Code 54952(c)(1)(B) and under MLH's adopted Bylaws.*

MLH is a private nonprofit public benefit corporation that receives funds from various local agencies, including, among others, the Town of Mammoth Lakes "the Town" and the County of Mono (the "County"). MLH's Board of Directors is required to include one Town and one County elected official, both of whom have full voting rights, and thus MLH is considered a "legislative body" under California Government Code Section 54952(c)(1)(B). In addition, MLH's bylaws require that MLH conduct its governing board meetings in compliance with the requirements under the Brown Act.

Los Angeles

213 627-6336

San Diego

619 239-6336

Goldfarb & Lipman LLP

All meetings of MLH's Board of Directors must be open and public, and all persons are permitted to attend any meeting of the Board of Directors, subject to the express exceptions provided in the Brown Act. To this end, MLH must establish regular times, and location for its Board meetings and must post an agenda in a location that is freely accessible to members of the public at least seventy-two (72) hours before a regular meeting, which contains the time and place of the meetings along with a brief general description of each item of business to be transacted or discussed at the meeting, including items to be discussed in closed sessions.

*Prior to the Covid Pandemic Teleconference Participation was allowed subject to strict noticing and accessibility requirements.* Prior to the COVID-19 pandemic, the Brown Act permitted legislative bodies to use any type of teleconferencing in connection with any meeting. Gov. Code § 54953(b)(2). The term "Teleconference" is defined to include a meeting of the legislative body, "the members of which are in different locations, connected by electronic means, through either audio or video, or both." Gov. Code § 54953(b)(4). To utilize teleconferencing under this provision, the legislative body is required to satisfy the following requirements: (1) identify each teleconference location in the agenda; (2) post the meeting agenda at each location where a member will participate from; (3) allow public access to each remote location (ensuring that each location meets accessibility requirements); and (4) a quorum of members must participate from locations within the agency's jurisdiction. Gov. Code § 54953(b)(3) (collectively, the "Teleconferencing Noticing Requirements").

*Conditions for holding remote meetings under AB 361 are set to expire soon.* During the COVID-19 pandemic, the legislature adopted AB 361 expanding the circumstances under which remote meetings could occur and revising the noticing rules related to remote participation under the Brown Act. The provisions of AB 361 apply only during a proclaimed state of emergency. Gov. Code § 54953(e)(1). In addition, state or local officials must have imposed or recommended social distancing measures, or the legislative body must determine, by majority vote, that meeting in-person would present imminent health or safety risks. *Id.* Public meeting postings are required in accordance with Brown Act requirements, and public participation must be provided for via call-in or internet-based service (Gov. Code § 54953(e)(2)) but the Teleconferencing Noticing Requirements under Gov. Code § 54953(b)(4) were waived. AB 361 required findings to be made every thirty (30) days regarding the continued need to use teleconferencing. Gov. Code § 54963(e)(3). The provisions of AB 261 expire on January 31, 2024. Gov. Code § 54953(k). However, the Covid-19 related proclamation of state of emergency is anticipated to expire February 28, 2023, which would have limited legislative bodies from conducting remote meetings, as of the date of its revocation.



### III. Changes Introduced by AB 2449

The legislature recently enacted AB 2449, in anticipation of the upcoming expiration of the proclaimed COVID-19 state of emergency on February 28, 2023. AB 2449 is intended to permit a limited number of individual members of a legislative body to participate in meetings virtually without posting their remote location(s), as would be required under the Teleconferencing Noticing Requirements.

To utilize the provisions of AB 2449, a majority of the members of the legislative body must *participate in-person from the same physical location identified in the agenda* posted for the meeting. Gov. Code § 54953(f)(1). The physical location must be within the boundaries of the agency's jurisdiction and must be open to the public. *Id.* The agency must provide public visual and audio observation of in-person meetings by two-way audiovisual platform or two-way telephonic service and live webcasting. Gov. Code § 54953(f)(1)(A). The agency must also permit public participation via call-in, internet service, and in-person comment. Gov. Code § 54953(f)(1)(C).

Individual members of the legislative body may request to appear remotely where there is either (1) just cause or (2) emergency circumstances. Gov. Code § 54953(f)(2). "Just cause" exists in limited instances requiring remote appearance, including: (1) caregiving need of a child, parent, grandparent, grandchild, sibling, spouse, or domestic partner; (2) contagious illness prevents attendance, (3) a need related to physical or mental disability not otherwise accommodated; or (4) traveling on official business of the legislative body or another state agency. Gov. Code § 54953(j)(2). "Emergency circumstances" are defined as a physical or family medical emergency that prevents a member from attending in person. Gov. Code § 54953(j)(1).

The member must notify the legislative body of either the "just cause" or the "emergency circumstances" and request remote appearance at the earliest opportunity possible, including the start of a regular meeting. Gov. Code § 54953(f)(2)(A). If the member's request is based on the existence of emergency circumstances, the member must include a general description (not to exceed 20 words) of the circumstance relating to the need to appear remotely. Gov. Code § 54953(f)(2)(A)(ii). Where the legislative body meets fewer than ten (10) times annually, a member cannot participate remotely more than twice for "just cause" or "emergency" reasons. Gov. Code § 54953(f)(3). Otherwise, a member cannot participate remotely for more than three (3) consecutive months or twenty percent (20%) of the body's regular meetings within a calendar year. *Id.*

### IV. Conclusion

The ability to hold remote meetings under AB 361 can continue until February 28, 2023, when the proclamation of state of emergency is set to expire. Thereafter, remote meeting participation will be limited under AB 2449 or be subject to the pre-pandemic rules for Teleconferencing Noticing Requirements.

The benefits of AB 2449 include: (1) no requirement of proclaimed state of emergency; (2) no requirement that the legislative body renew its findings every thirty (30) days; (3) no prior notification or approval is required for remote participation; and (4) no requirement to comply with the Teleconferencing Noticing Requirements at all remote locations. On the other hand, the downside of these provisions is that, unlike the traditional Brown Act teleconferencing rules authorized by Government Code Section 54953(b)(2), these provisions may only be utilized a limited number of times by member of the governing board.

AB 2449 was adopted as an alternative to and did not repeal or replace the existing teleconferencing rules under the Brown Act. MLH's Governing Board may continue to allow for teleconference participation under Gov't Gov. Code § 54953(b)(2) so long as the Teleconferencing Notice Requirements are satisfied including: (1) identifying each teleconference location in the meeting notice; (2) posting a meeting agenda at each location where a member will participate from; (3) allowing public access to each remote location; and (4) so long as a quorum of members of MLH's Board of Directors is participating from locations within the agency's jurisdiction. There are no statutory limits on the number of times a governing board member may participate via teleconference so long as the Teleconferencing Notice Requirements are satisfied for each meeting.



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**STAFF REPORT**

**Subject:** The Board will receive an update regarding the Project Homekey, Innsbruck Lodge Affordable Housing project and discuss additional funding options, including a possible permanent capital investment in the amount of \$141,131.

**Presented by:** Patricia Robertson, Executive Director

**BACKGROUND**

MLH and the Town of Mammoth Lakes partnered on a Project Homekey Round 2 application in January 2022.

We were awarded \$4.41 million for the acquisition and rehabilitation of the Innsbruck Lodge into 15 studio apartments and 1 manager’s unit.

**PROPOSED PROJECT TIMELINE**

MILESTONE	COMPLETED	EXPECTED
Award	May 17, 2022	
Contract with the State	June 2022	
Architect Contract Approved by MLH	June 2022	
Building Permit Application Submitted	October 4, 2022 <i>Confirmed receipt</i>	
1 <sup>st</sup> Round of Plan Check Comments Received	October 17, 2022	
Meeting with the Town team on Project Homekey Design Guidelines	November 10, 2022	
Alternative Means & Methods submitted	November 21, 2022	
Funding Gap Discussions		January – February 2023
MLH executed demo contract		January 2023
Building Permit 2 <sup>nd</sup> submission		January 20, 2023
Pull building permit once all funding is secured		February 2023
Demolition		Late January
Construction Complete	12/30/23 – extension approved by HCD	
Full occupancy	2/28/24 – <b>deadline 60 days after construction complete</b>	

Allowance for 10% vacancy
---------------------------

**PROJECT UPDATE**

A. HCD-Related Items

- a. Standard Agreement revision
- b. Rehab draw request form
- c. Regulatory Agreement draft

B. MLH-Town Items

- a. Plans in building permit plan-check process
- b. Received first round of comments. Held a meeting with the Town regarding Building Code conformance. Submitted an Alternative Means & Methods proposal. Waiting for comments and/or approval to move forward.
- c. GC chosen. Working through Value Engineering process, potential savings identified of about \$400,000; depending on outcome of Building Plan Check.
- d. Water Permit ready
- e. Fire Permit status – follow up

C. FINANCING

- a. Funding gap of approximately \$500,000
- b. Alterra Mountain Company Community Foundation request - **\$200,000 denied**
- c. Eastern Sierra CoC of HHAP Round 1 & 2 funds - **\$343,338 approved**

Innsbruck Lodge	Application Budget	Awarded Budget	Final Development Budget	Comments
Land and Acquisition	\$3,500,000	\$3,500,000	\$3,503,887	
Rehab Costs	\$1,572,814	\$1,837,684	\$2,364,928	This is after VE; waiting to hear back on 1 <sup>st</sup> plan check comments
Architecture & Soft Costs	\$736,167	\$736,167	\$746,167	
Insurance & Taxes		\$33,165	\$33,165	
Permit & DIF		\$45,303	\$45,303	*Potential Waivers?
Reserves	\$31,019	\$31,019	\$31,019	
Contingency	\$120,000	\$120,000	\$120,000	
<b>Total Sources</b>	<b>\$5,960,000</b>	<b>\$6,303,338</b>	<b>\$6,844,469</b>	
		<b>FUNDING GAP</b>	<b>\$541,131</b>	

Innsbruck Lodge Funding Sources	Amount	Final Development Budget
Project Homekey	\$4,410,000	
Town of Mammoth Lakes	\$1,000,000	
Mono County	\$550,000	
Continuum of Care	343,338	
<b>TOTAL</b>	<b>\$6,303,338</b>	<b>\$6,844,469</b>

	<b>FUNDING GAP</b>	<b>\$541,131</b>
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**NEXT STEPS**

The Board should discuss funding options for the project gap. This item is tentatively scheduled to go before the Town Council as well on February 15, 2023.

**RECOMMENDATION**

The Board should receive the update, ask any clarifying questions, and provide staff direction if necessary.



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## **STAFF REPORT**

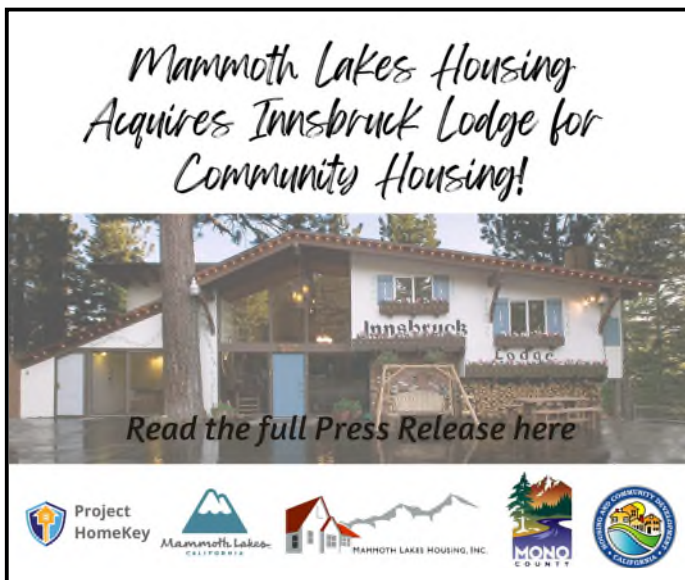
**Subject:** The Board will consider authorizing the rehabilitation contract for Innsbruck Lodge with Christian Hansen Construction in an amount not to exceed \$2,384,928.

**Presented by:** Patricia Robertson, Executive Director

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## **BACKGROUND**

Mammoth Lakes Housing, Inc. purchased the Innsbruck Lodge in August 2022 through a joint Project Homekey grant application in partnership with the Town of Mammoth Lakes. The intent is to convert the hotel into 15 affordable apartments and 1 manager's unit.



The project was awarded \$4.41M from Project Homekey, \$1M from the Town, \$550,000 from Mono County, and \$343,338 from the regional Continuum of Care.

At the December 5, 2022 meeting of the Board of Directors, the Board directed staff to move forward with the demolition contract with Christian Hansen to start transforming the property.

Other project updates include:

- Certified payroll training for all sub-contractors, 1/24
- Roof shoveled week of 1/16

- Building plan resubmittal 1/19/2023
- Water permit – ready for payment and pick-up
- Fire permit in process
- Demolition starts TODAY!

**NEXT STEPS**

1. Demo to finish after 15 working days (weather dependent)
2. Funding discussion with Town 2/15
3. Once all funding secured, then conversion can commence
4. Project deadline – Dec 30, 2023
5. Occupancy deadline – February 28, 2024

**RECCOMENDATION**

The Board should consider directing staff by motion to negotiate the Rehabilitation contract with Hansen Construction for the Project Homekey site in the amount of \$2,384,928.

**ATTACHMENTS**

1. Template contract, pending legal review from both parties

# DRAFT AIA® Document A102™ - 2017

## Standard Form of Agreement Between Owner and Contractor where the basis of payment is the Cost of the Work Plus a Fee with a Guaranteed Maximum Price

**AGREEMENT** made as of the «**■**» day of «**■**» in the year «**■**»  
(In words, indicate day, month and year.)

**BETWEEN** the Owner:  
(Name, legal status, address and other information)

«**>>**»  
«**>**»  
«**>**»  
«**>**»

and the Contractor:  
(Name, legal status, address and other information)

«**>>**»  
«**>**»  
«**>**»  
«**>**»

for the following Project:  
(Name, location and detailed description)

«**>**»  
«**>**»  
«**>**»

The Architect:  
(Name, legal status, address and other information)

«**>>**»  
«**>**»  
«**>**»  
«**>**»

[To be used with AIA Document A102™-2017, Exhibit A, Insurance and Bonds]

The Owner and Contractor agree as follows.

The Work consists of the construction of the \_\_\_\_\_ development which includes but is not limited to, \_\_\_\_\_ as set forth in the Plans and Specifications. The Work is financed with the following funding sources: construction loan from \_\_\_\_\_. The Project is a \_\_\_\_\_ and is therefore subject to certain [federal requirements]. The Contractor acknowledges that the Owner's funding for the Project depends upon the fulfillment of an investment commitment to the Project by an equity investor (the "Equity Investment"), the provision of which is dependent upon the receipt of the low-income housing tax credits (the "Housing Credits") allocated to the Project by the State of California Tax Credit Allocation Committee; and that the Owner will only receive the Housing Credits, and the full amount of the Equity

**ADDITIONS AND DELETIONS:** The author of this document has added information needed for its completion. The author may also have revised the text of the original AIA standard form. An *Additions and Deletions Report* that notes added information as well as revisions to the standard form text is available from the author and should be reviewed.

This document has important legal consequences. Consultation with an attorney is encouraged with respect to its completion or modification.

The parties should complete A102™-2017, Exhibit A, Insurance and Bonds, contemporaneously with this Agreement. AIA Document A201™-2017, General Conditions of the Contract for Construction, is adopted in this document by reference. Do not use with other general conditions unless this document is modified.

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Investment will only be provided, if construction is complete within the Contract Time.**REVISE TO MATCH PROJECT**

Lenders to the work are: \_\_\_\_\_



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### EXHIBIT A INSURANCE AND BONDS

#### ARTICLE 1 THE CONTRACT DOCUMENTS

The Contract Documents consist of this Agreement, Conditions of the Contract (General, Supplementary, and other Conditions), Drawings, Specifications, Addenda issued prior to execution of this Agreement, other documents listed in this Agreement and Modifications issued after execution of this Agreement, all of which form the Contract, and are as fully a part of the Contract as if attached to this Agreement or repeated herein. The Contract represents the entire and integrated agreement between the parties hereto and supersedes prior negotiations, representations, or agreements, either written or oral. If anything in the other Contract Documents, other than a Modification, is inconsistent with this Agreement, this Agreement shall govern. An enumeration of the Contract Documents, other than a Modification, appears in Article 16.

#### ARTICLE 2 THE WORK OF THIS CONTRACT

The Contractor shall fully execute the Work described in the Contract Documents and reasonably inferable by the Contractor as necessary to produce the results intended by the Contract Documents, except as specifically indicated in the Contract Documents to be the responsibility of others.

#### ARTICLE 3 RELATIONSHIP OF THE PARTIES

The Contractor accepts the relationship of trust and confidence established by this Agreement and covenants with the Owner to cooperate with the Architect and the Owner, as applicable, and exercise the Contractor's skill and judgment in furthering the interests of the Owner; to furnish efficient business administration and supervision; to furnish at all

times an adequate supply of workers and materials; and to perform the Work in an expeditious and economical manner consistent with the Owner's interests. The Owner agrees to furnish and approve, in a timely manner, information required by the Contractor and to make payments to the Contractor in accordance with the requirements of the Contract Documents.

#### ARTICLE 4 DATE OF COMMENCEMENT AND SUBSTANTIAL COMPLETION

§ 4.1 The date of commencement of the Work shall be:

(Check one of the following boxes.)

[  ] The date of this Agreement.

[  ] A date set forth in a notice to proceed issued by the Owner.

[  ] Established as follows:

(Insert a date or a means to determine the date of commencement of the Work.)

« »

If a date of commencement of the Work is not selected, then the date of commencement shall be the date of this Agreement.

§ 4.2 The Contract Time shall be measured from the date of commencement of the Work.

#### § 4.3 Substantial Completion

§ 4.3.1 Subject to adjustments of the Contract Time as provided in the Contract Documents, the Contractor shall achieve Substantial Completion of the entire Work:

(Check one of the following boxes and complete the necessary information.)

[  ] Not later than « » ( « » ) calendar days from the date of commencement of the Work.

[  ] By the following date: « »

§ 4.3.2 Subject to adjustments of the Contract Time as provided in the Contract Documents, if portions of the Work are to be completed prior to Substantial Completion of the entire Work, the Contractor shall achieve Substantial Completion of such portions by the following dates:

Portion of Work

« »

Substantial Completion Date

§ 4.3.3 If the Contractor fails to achieve Substantial Completion as provided in this Section 4.3, liquidated damages, if any, shall be assessed as set forth in Section 5.1.6.

#### ARTICLE 5 CONTRACT SUM

§ 5.1 The Owner shall pay the Contractor the Contract Sum in current funds for the Contractor's performance of the Contract. The Contract Sum is the Cost of the Work as defined in Article 7 plus the Contractor's Fee. The Contract Sum is based on the Contractor's Schedule of Values attached as an Exhibit to this Agreement and incorporated herein. In no event shall the sum of Contractor's total general conditions (excluding contractor's general liability insurance), overhead and profit exceed 14.00% of the Cost of the Work. If at any point the sum of Contractor's total general conditions (excluding contractor's general liability insurance), overhead and profit exceeds 14.00% of the Cost of the Work (including through Change Orders and/or Savings) the Contractor shall refund to the Owner the difference. The Contractor acknowledges that the 14.00% limit is imposed by the California Tax Credit Allocation Committee and is not subject to negotiation.

§ 5.1.1 The Contractor's Fee: (including overhead and profit): is equal to \_\_\_percent (\_\_\_%) of that portion of the Cost of the Work that is incurred by the Contractor and shall be billed monthly, proportionate to the percentage of Work completed. The cost of insurance and bond premiums shall not be included in the Cost of the Work for the purposes of calculating the Contractor's Fee.

(State a lump sum, percentage of Cost of the Work, or other provision for determining the Contractor's Fee.)

« »

**§ 5.1.2** The method of adjustment of the Contractor's Fee for changes in the Work:

« For changes in the Work, the total amount of overhead and profit claimed shall not exceed \_\_\_\_\_ percent ( \_\_\_\_\_ %) of the documented direct costs of the work to be performed pursuant to the Change Order or Construction Change Directive. When both additions and credits are involved in any one change, the allowance for overhead and profit shall be figured on the basis of the net increase if any. The same overhead and profit limits as established for change order additions shall be credited to change order deductions. No other cost, including special damages of any type, arising out of or connected with the performance of extra work, of any nature, may be recovered by the Contractor. »

**§ 5.1.3** Limitations, if any, on a Subcontractor's overhead and profit for increases in the cost of its portion of the Work:

« See Section 5.1.2 for the maximum cumulative limit on overhead and profit »

**§ 5.1.4** Rental rates for Contractor-owned equipment shall not exceed the standard rental rate paid at the place of the Project.

**§ 5.1.5** Unit prices, if any:

(Identify the item and state the unit price and quantity limitations, if any, to which the unit price will be applicable.)

Item	Units and Limitations	Price Per Unit (\$0.00)
« »		

**§ 5.1.6** Liquidated damages, if any:

(Insert terms and conditions for liquidated damages, if any.)

« Time is of the essence in the performance of the Work. By executing this Agreement, Contractor represents that it can and will complete the Work within the dates set forth in Article 4 above. Contractor acknowledges that Owner's funders and investors require completion of the Work within the time set forth in this Article 3 and such funding sources would be in jeopardy if the Work is delayed. If the Contractor fails to reach Substantial Completion by the date required by Article 4 of this Agreement, the parties agree that the Owner would suffer damages related to the delay, but that such damages would be extremely difficult and impracticable to ascertain. The parties therefore agree that a reasonable estimate of the damages to be suffered by the Owner in the event of such a delay is \_\_\_\_\_ Dollars (\$\_\_\_\_\_) per day. The Contractor shall therefore pay to the Owner that amount for each calendar day during which Substantial Completion is delayed beyond the date Substantial Completion is required and as set forth in Article 4. At the Owner's discretion, Owner shall be entitled to deduct such amount from any payment otherwise due Contractor. Any such amount not deducted shall be immediately payable by Contractor to Owner on Owner's demand. Such payments are as liquidated damages and are not a penalty. Such liquidated damages are not in lieu of Contractor's indemnity obligations set forth separately in the Contract, nor shall these liquidated damages preclude the Owner from recovering its actual damages for any damages claimed by third parties even if arising out of the Contractor's delay. »

**§ 5.1.7** Other:

(Insert provisions for bonus, cost savings or other incentives, if any, that might result in a change to the Contract Sum.)

« At the completion of the Contractor's final job cost accounting, the difference between (i) the total aggregate sum of the cost of the Work plus the Contractor's Fee and (ii) the Guaranteed Maximum Price (the "Savings") shall be shared by the Owner and Contractor as follows: \_\_\_\_\_ percent (\_\_\_\_%) of such Savings shall inure to the benefit of the Owner and the remainder if any, shall be paid to the Contractor as an additional fee (subject to the 14% limit set forth in Section 5.1 above). Insurance and bond amounts, and unused Contractor's contingency if allowed by Owner, shall not be included in calculating Savings. Any savings in allowance categories shall go 100% to Owner via deductive Change Order. The Contractor shall not be entitled to any portion of Savings if the Owner terminates this Contract for

cause or if the Contractor terminates the Contract for any reason prior to Substantial Completion. Any Savings shall not be paid until the date due for Final Payment and is subject to deductions for amounts due Owner under this Agreement.»

**§ 5.2 Guaranteed Maximum Price**

**§ 5.2.1** The Contract Sum is guaranteed by the Contractor not to exceed «**■**» (\$ «**■**» ), subject to additions and deductions by Change Order as provided in the Contract Documents. This maximum sum is referred to in the Contract Documents as the Guaranteed Maximum Price. Costs which would cause the Guaranteed Maximum Price to be exceeded shall be paid by the Contractor without reimbursement by the Owner.

If the Guaranteed Maximum Price includes a contingency line item (the “Contract Contingency”) for use by Contractor, such Contract Contingency and any withdrawal from the Contract Contingency is subject to the approval of the Owner. Contractor shall provide the Owner a written request describing the amount of funds requested and the reason why use of the Contract Contingency is appropriate and necessary for the completion of the Work. The Contract Contingency is not allocated to any particular item of the Cost of the Work and is established for increases in Cost in the Work incurred by Contractor for unforeseen causes or details not capable of reasonable anticipation at the time of the Owner’s approval of the Guaranteed Maximum Price and such other costs, if any, that are expressly authorized by the Contract Documents to be paid from such Contract Contingency and are not included in other line items in the Schedule of Values. In no event shall the Contract Contingency be available for: (i) costs not to be reimbursed in accordance with Article 8; (ii) the Contractor’s Fee; (iii) General Conditions Costs; (iv) the Correction of Work rejected by Owner as not being in conformance with the Contract Documents; (v) costs that could have been avoided by mitigation efforts of the Contractor; and (vi) items arising from the negligence or willful misconduct of the Contractor or its Subcontractors. Any funds remaining in the Contract Contingency category as of the final accounting shall inure 100% to the Owner. Contractor shall provide the Owner with a monthly report indicating the status of the Contract Contingency.

**§ 5.2.2 Alternates**

**§ 5.2.2.1** Alternates, if any, included in the Guaranteed Maximum Price:

Item	Price
« <b>■</b> »	« <b>■</b> »

**§ 5.2.2.2** Subject to the conditions noted below, the following alternates may be accepted by the Owner following execution of this Agreement. Upon acceptance, the Owner shall issue a Modification to this Agreement. (Insert below each alternate and the conditions that must be met for the Owner to accept the alternate.)

Item	Price	Conditions for Acceptance
« <b>■</b> »	« <b>■</b> »	« <b>■</b> »

**§ 5.2.3** Allowances, if any, included in the Guaranteed Maximum Price: All Allowances shall be expressly identified in the Contractor’s Schedule of Values and shall indicate the scope of coverage of the Allowance. Contractor shall give written notice to the Owner if the estimated costs to perform the work and/or supply the material or equipment by the Allowance will exceed the amount estimated for that Allowance prior to commencing work covered by the Allowance. If the actual cost of any Allowance items is more or less than the Allowance amount set forth in the Schedule of Values, the difference shall be transferred to the Owner as an additive or deductive Change Order as applicable and the amount of the difference shall not be considered in the calculation of Savings. (Identify each allowance.)

Item	Price
« <b>■</b> »	« <b>■</b> »

**§ 5.2.4** Assumptions, if any, upon which the Guaranteed Maximum Price is based: (Identify each assumption.)

« <b>■</b> »
--------------

**§ 5.2.5** By executing this Agreement and furnishing Owner with both a Schedule of Values, attached as an Exhibit to this Agreement, and a construction schedule, attached as an Exhibit to this Agreement, the Contractor represents that the Contract Documents and the materials and information furnished to the Contractor as of the date of this Agreement, have described the scope, construction requirements and design of the Work in sufficient detail to enable the Contractor to firmly establish the Guaranteed Maximum Price. Where the Owner and the Contractor have agreed that there is uncertainty in regards to an item, the Contractor has qualified and/or identified that item in any Qualifications and Exclusions provided by the Contractor.

**§ 5.2.6** The Owner shall authorize preparation of revisions to the Contract Documents that incorporate the agreed-upon assumptions contained in Section 5.2.4. The Owner shall promptly furnish such revised Contract Documents to the Contractor. The Contractor shall notify the Owner and Architect of any inconsistencies between the agreed-upon assumptions contained in Section 5.2.4 and the revised Contract Documents.

## **ARTICLE 6 CHANGES IN THE WORK**

**§ 6.1** Adjustments to the Guaranteed Maximum Price on account of changes in the Work may be determined by any of the methods listed in Article 7 of AIA Document A201™–2017, General Conditions of the Contract for Construction. General conditions/requirements shall not be included in additive Change Orders unless the Owner has approved additional Contract Time and the Owner has approved additional general conditions/requirements pursuant to Article 8 of the A201.

**§ 6.2** Adjustments to subcontracts awarded on the basis of a stipulated sum shall be determined in accordance with Article 7 of A201–2017, as they refer to “cost” and “fee,” and not by Articles 5, 7 and 8 of this Agreement. Adjustments to subcontracts awarded with the Owner’s prior written consent on the basis of cost plus a fee shall be calculated in accordance with the terms of this Agreement, unless the Owner has furnished the Contractor with prior written approval of the form and substance of a subcontract, in which case such adjustments shall be calculated in accordance with the terms and conditions of that subcontract.

**§ 6.3** In calculating adjustments to the Guaranteed Maximum Price, the terms “cost” and “costs” as used in Article 7 of AIA Document A201–2017 shall mean the Cost of the Work as defined in Article 7 of this Agreement and the term “fee” shall mean the Contractor’s Fee as defined in Section 5.1.1 of this Agreement.

**§ 6.4 INTENTIONALLY DELETED.**

## **ARTICLE 7 COSTS TO BE REIMBURSED**

### **§ 7.1 Cost of the Work**

**§ 7.1.1** The term Cost of the Work shall mean costs necessarily incurred by the Contractor in the proper performance of the Work. The Cost of the Work shall include only the items set forth in this Article 7.

**§ 7.1.2** Where, pursuant to the Contract Documents, any cost is subject to the Owner’s prior approval, the Contractor shall obtain such approval in writing prior to incurring the cost.

**§ 7.1.3** Costs shall be at rates not higher than the standard paid at the place of the Project, except with prior approval of the Owner.

**§ 7.1.4** Costs as defined herein shall be actual costs paid by the Contractor, less all discounts, rebates, and salvages that shall be taken by the Contractor, subject to Article 9 of this Agreement. All payments made by the Owner pursuant to this Article 7, whether those payments are actually made before or after the execution of this Agreement, are included within the Guaranteed Maximum Price specified in Section 5.2 above; provided, however, that in no event shall the Owner be required to reimburse the Contractor for any portion of the Cost of the Work incurred prior to the Commencement Date unless the Contractor has received the Owner’s written consent prior to incurring such cost.

**§ 7.1.5** Notwithstanding the breakdown or categorization of any costs to be reimbursed in this Article 7 or elsewhere in the Contract Documents, there shall be no duplication of payment in the event any particular items for which payment is requested can be characterized as falling into more than one of the types of compensable or reimbursable categories.

## § 7.2 Labor Costs

§ 7.2.1 Wages or salaries of construction workers directly employed by the Contractor to perform the construction of the Work at the site or, with the Owner's prior written approval, at off-site workshops.

§ 7.2.2 Wages or salaries of the Contractor's supervisory and administrative personnel when stationed at the site and performing Work, with the Owner's prior approval.

§ 7.2.2.1 Wages or salaries of the Contractor's supervisory and administrative personnel when performing Work and stationed at a location other than the site, but only for that portion of time required for the Work, and limited to the personnel and activities listed below:

*(Identify the personnel, type of activity and, if applicable, any agreed upon percentage of time to be devoted to the Work.)*

<< >>

## § 7.2.3 INTENTIONALLY DELETED.

§ 7.2.4 Costs paid or incurred by the Contractor, as required by law or collective bargaining agreements, for taxes, insurance, contributions, assessments, and benefits and, for personnel not covered by collective bargaining agreements, customary benefits such as sick leave, medical and health benefits, holidays, vacations and pensions, provided such costs are based on wages and salaries included in the Cost of the Work under Sections 7.2.1 through 7.2.3.

§ 7.2.5 If agreed rates for labor costs, in lieu of actual costs, are provided in this Agreement, the rates shall remain unchanged throughout the duration of this Agreement, unless the parties execute a Modification.

## § 7.3 Subcontract Costs

Payments made by the Contractor to Subcontractors in accordance with the requirements of the subcontracts and this Agreement.

## § 7.4 Costs of Materials and Equipment Incorporated in the Completed Construction

§ 7.4.1 Costs, including transportation and storage at the site, of materials and equipment incorporated, or to be incorporated, in the completed construction.

§ 7.4.2 Costs of materials described in the preceding Section 7.4.1 in excess of those actually installed to allow for reasonable waste and spoilage. Unused excess materials, if any, shall become the Owner's property at the completion of the Work and shall be properly stored at the site in accordance with the Owner's instructions or, at the Owner's option, shall be sold by the Contractor. Any amounts realized from such sales shall be credited to the Owner as a deduction from the Cost of the Work.

## § 7.5 Costs of Other Materials and Equipment, Temporary Facilities and Related Items

§ 7.5.1 Costs of transportation, storage, installation, dismantling, maintenance, and removal of materials, supplies, temporary facilities, machinery, equipment and hand tools not owned by construction workers that are provided by the Contractor at the site and fully consumed in the performance of the Work. Any such items used but not consumed, which are paid for by the Owner, shall become the property of the Owner, and shall be delivered to the Owner upon completion of the Work in accordance with the Owner's instructions. If the Owner elects, however, the Contractor may purchase any such items from the Owner at a price mutually acceptable to the parties.

§ 7.5.2 Rental charges for temporary facilities, machinery, equipment, and hand tools not owned by construction workers that are provided by the Contractor at the site, and the costs of transportation, installation, dismantling, minor repairs, and removal of such temporary facilities, machinery, equipment, and hand tools. Rates and quantities of equipment owned by the Contractor, or a related party as defined in Section 7.8, shall be subject to the Owner's prior approval. The total rental cost of any such equipment may not exceed the purchase price of any comparable item.

§ 7.5.3 Costs of removal of debris from the site of the Work and its proper and legal disposal.

§ 7.5.4 Costs of the Contractor's site office, including general office equipment and supplies.

§ 7.5.5 Costs of materials and equipment suitably stored off the site at a mutually acceptable location, subject to the Owner's prior approval.

## § 7.6 Miscellaneous Costs

§ 7.6.1 Premiums for that portion of insurance and bonds required by the Contract Documents that can be directly attributed to this Contract.

§ 7.6.1.1 INTENTIONALLY DELETED.

§ 7.6.1.2 INTENTIONALLY DELETED.

§ 7.6.2 Sales, use, or similar taxes, imposed by a governmental authority, that are related to the Work and for which the Contractor is liable.

§ 7.6.3 Fees and assessments for the building permit, and for other permits, licenses, and inspections, for which the Contractor is required by the Contract Documents to pay.

§ 7.6.4 Fees of laboratories for tests required by the Contract Documents; except those related to defective or nonconforming Work for which reimbursement is excluded under Article 13 of AIA Document A201–2017 or by other provisions of the Contract Documents, and which do not fall within the scope of Section 7.7.3.

§ 7.6.5 Royalties and license fees paid for the use of a particular design, process, or product, required by the Contract Documents.

§ 7.6.5.1 The cost of defending suits or claims for infringement of patent rights arising from requirements of the Contract Documents, payments made in accordance with legal judgments against the Contractor resulting from such suits or claims, and payments of settlements made with the Owner's consent, unless the Contractor had reason to believe that the required design, process or product was an infringement of a copyright or a patent, and the Contractor failed to promptly furnish such information to the Architect as required by Article 3 of AIA Document A201–2017. The costs of legal defenses, judgments, and settlements, shall not be included in the Cost of the Work used to calculate the Contractor's Fee or subject to the Guaranteed Maximum Price.

§ 7.6.6 Costs for communications services, electronic equipment, and software, directly related to the Work and located at the site, with the Owner's prior written approval.

§ 7.6.7 Costs of document reproductions and delivery charges.

§ 7.6.8 Deposits lost for causes other than the Contractor's negligence or failure to fulfill a specific responsibility in the Contract Documents.

§ 7.6.9 Legal, mediation and arbitration costs, including attorneys' fees, other than those arising from disputes between the Owner and Contractor, reasonably incurred by the Contractor after the execution of this Agreement in the performance of the Work and with the Owner's prior approval, which shall not be unreasonably withheld.

§ 7.6.10 Expenses incurred in accordance with the Contractor's standard written personnel policy for relocation and temporary living allowances of the Contractor's personnel required for the Work, with the Owner's prior written approval.

§ 7.6.11 That portion of the reasonable expenses of the Contractor's supervisory or administrative personnel incurred while traveling in discharge of duties connected with the Work with Owner's prior written approval.

## § 7.7 Other Costs and Emergencies

§ 7.7.1 Other costs incurred in the performance of the Work, with the Owner's prior written approval.

§ 7.7.2 Costs incurred in taking action to prevent threatened damage, injury, or loss, in case of an emergency affecting the safety of persons and property, as provided in Article 10 of AIA Document A201–2017 to the extent not (1) caused by the Contractor, a Subcontractor, or anyone for whom either is responsible, or (2) capable of being prevented through timely notice of an unsafe condition to the Owner.



**§ 7.7.3** Costs of repairing or correcting damaged or nonconforming Work executed by the Contractor, Subcontractors, or suppliers, provided that such damaged or nonconforming Work was not caused by the negligence of, or failure to fulfill a specific responsibility by, the Contractor, and only to the extent that the cost of repair or correction is not recovered by the Contractor from insurance, sureties, Subcontractors, or suppliers, provided that any absence of collectible insurance is not due to the Contractor's breach of a contract for insurance, or breach of its obligation to maintain insurance under the Contract..

### **§ 7.8 Related Party Transactions**

**§ 7.8.1** For purposes of this Section 7.8, the term "related party" shall mean (1) a parent, subsidiary, affiliate, or other entity having common ownership of, or sharing common management with, the Contractor; (2) any entity in which any stockholder in, or management employee of, the Contractor holds an equity interest in excess of ten percent in the aggregate; (3) any entity which has the right to control the business or affairs of the Contractor; or (4) any person, or any member of the immediate family of any person, who has the right to control the business or affairs of the Contractor.

**§ 7.8.2** If any of the costs to be reimbursed arise from a transaction between the Contractor and a related party, the Contractor shall notify the Owner of the specific nature of the contemplated transaction, including the identity of the related party and the anticipated cost to be incurred, before any such transaction is consummated or cost incurred. If the Owner, after such notification, authorizes the proposed transaction in writing, then the cost incurred shall be included as a cost to be reimbursed, and the Contractor shall procure the Work, equipment, goods, or service, from the related party, as a Subcontractor, according to the terms of Article 10. If the Owner fails to authorize the transaction in writing, the Contractor shall procure the Work, equipment, goods, or service from some person or entity other than a related party according to the terms of Article 10. In no event shall such transaction exceed the costs of a transaction with a party that is not a "related party".

### **ARTICLE 8 COSTS NOT TO BE REIMBURSED**

**§ 8.1** The Cost of the Work shall not include the items listed below:

- .1 Salaries and other compensation of the Contractor's personnel stationed at the Contractor's principal office or offices other than the site office, except as specifically provided in Section 7.2, or as may be provided in Article 15;
- .2 Bonuses, profit sharing, incentive compensation, and any other discretionary payments, paid to anyone hired by the Contractor or paid to any Subcontractor or vendor, unless the Owner has provided prior approval;
- .3 Expenses of the Contractor's principal office and offices other than the site office;
- .4 Overhead and general expenses, except as may be expressly included in Article 7;
- .5 The Contractor's capital expenses, including interest on the Contractor's capital employed for the Work;
- .6 Except as provided in Section 7.7.3 of this Agreement, costs due to the negligence of, or failure to fulfill a specific responsibility of the Contract by, the Contractor, Subcontractors, and suppliers, or anyone directly or indirectly employed by any of them or for whose acts any of them may be liable;
- .7 Rental cost of machinery, except as specifically provided in Section 7.5.2;
- .8 Any cost not specifically and expressly described in Article 7; and
- .9 Costs, other than costs included in Change Orders approved by the Owner, that would cause the Guaranteed Maximum Price to be exceeded.

### **ARTICLE 9 DISCOUNTS, REBATES AND REFUNDS**

**§ 9.1** Cash discounts obtained on payments made by the Contractor shall accrue to the Owner if (1) before making the payment, the Contractor included the amount to be paid, less such discount, in an Application for Payment and received payment from the Owner, or (2) the Owner has deposited funds with the Contractor with which to make payments; otherwise, cash discounts shall accrue to the Contractor. Trade discounts, rebates, refunds, and amounts received from sales of surplus materials and equipment shall accrue to the Owner, and the Contractor shall make provisions so that they can be obtained.

**§ 9.2** Amounts that accrue to the Owner in accordance with the provisions of Section 9.1 shall be credited to the Owner as a deduction from the Cost of the Work.

### **ARTICLE 10 SUBCONTRACTS AND OTHER AGREEMENTS**

**§ 10.1** Those portions of the Work that the Contractor does not customarily perform with the Contractor's own personnel shall be performed under subcontracts or other appropriate agreements with the Contractor. The Owner may designate specific persons from whom, or entities from which, the Contractor shall obtain bids. The Contractor shall

obtain bids from Subcontractors, and from suppliers of materials or equipment fabricated especially for the Work, who are qualified to perform that portion of the Work in accordance with the requirements of the Contract Documents. The Contractor shall deliver such bids to the Architect and Owner with an indication as to which bids the Contractor intends to accept. The Owner then has the right to review the Contractor's list of proposed subcontractors and suppliers in consultation with the Architect and, subject to Section 10.1.1, to object to any subcontractor or supplier. Any advice of the Architect, or approval or objection by the Owner, shall not relieve the Contractor of its responsibility to perform the Work in accordance with the Contract Documents. The Contractor shall not be required to contract with anyone to whom the Contractor has reasonable objection.

**§ 10.1.1** When a specific subcontractor or supplier (1) is recommended to the Owner by the Contractor; (2) is qualified to perform that portion of the Work; and (3) has submitted a bid that conforms to the requirements of the Contract Documents without reservations or exceptions, but the Owner requires that another bid be accepted, then the Contractor may require that a Change Order be issued to adjust the Guaranteed Maximum Price by the difference between the bid of the person or entity recommended to the Owner by the Contractor and the amount attributable to such subcontract or other agreement in the original Schedule of Values submitted by Contractor and accepted by the Owner.

**§ 10.2** Subcontracts or other agreements shall conform to the applicable payment provisions of this Agreement, and shall not be awarded on the basis of cost plus a fee without the Owner's prior written approval. If a subcontract is awarded on the basis of cost plus a fee, the Contractor shall provide in the subcontract for the Owner to receive the same audit rights with regard to the Subcontractor as the Owner receives with regard to the Contractor in Article 11.

## **ARTICLE 11 ACCOUNTING RECORDS**

The Contractor shall keep full and detailed records and accounts related to the Cost of the Work, and exercise such controls, as may be necessary for proper financial management under this Contract and to substantiate all costs incurred. The accounting and control systems shall be satisfactory to the Owner. The Owner and the Owner's auditors shall, during regular business hours and upon reasonable notice, be afforded access to, and shall be permitted to audit and copy, the Contractor's records and accounts, including complete documentation supporting accounting entries, books, job cost reports, correspondence, instructions, drawings, receipts, subcontracts, Subcontractor's proposals, Subcontractor's invoices, purchase orders, vouchers, memoranda, and other data relating to this Contract. The Contractor shall preserve these records for a period of three years after final payment, or for such longer period as may be required by law. If the Owner's audit reveals an overcharge, the Contractor shall pay the Owner upon demand 100% of such overcharge and the Owner's administrative expenses incurred in determining the overcharge.

## **ARTICLE 12 PAYMENTS**

### **§ 12.1 Progress Payments**

**§ 12.1.1** Provided the Contractor is not in breach of its obligations under the Contract Documents, and based upon Applications for Payment including all necessary supporting documentation submitted to the Architect and the Owner by the Contractor, and Certificates for Payment issued by the Architect, and approved by the Owner, the Owner shall make progress payments on account of the Contract Sum, to the Contractor, as provided below and elsewhere in the Contract Documents.

**§ 12.1.2** The period covered by each Application for Payment shall be one calendar month ending on the last day of the month. Contractor's monthly allowable draw of general conditions shall be at a rate roughly equal to the percentage of the Work which has been completed, and shall be in accordance with a schedule of payments to be agreed upon with the Owner (the "General Conditions Payment Schedule"). If at any time the amount of general conditions paid to the Contractor as percentage of the total general conditions due, exceeds the percentage of the Work completed, or the Lender or Owner requires a readjustment in the monthly amount, the Owner and the Contractor shall adjust the General Conditions Payment Schedule as necessary to bring the payment amount more in line with the percentage of Work that has been completed.

« »

**§ 12.1.3** After a complete Application for Payment is received by the Architect and the Owner and a Certificate for Payment has been issued by the Architect and approved by Owner, the Owner shall make payment of the amount certified to the Contractor not later thirty (30) days after receipt of the Application for Payment. .  
(Federal, state or local laws may require payment within a certain period of time.)

§ 12.1.4 With each Application for Payment, the Contractor shall submit payrolls, petty cash accounts, receipted invoices or invoices with check vouchers attached, and any other evidence required by the Owner or Architect to demonstrate that payments already made by the Contractor on account of the Cost of the Work equal or exceed progress payments already received by the Contractor plus payrolls for the period covered by the present Application for Payment, less that portion of the progress payments attributable to the Contractor's Fee.

§ 12.1.5 Each Application for Payment shall be based on the most recent schedule of values submitted by the Contractor in accordance with the Contract Documents. The schedule of values shall allocate the entire Guaranteed Maximum Price among: (1) the various portions of the Work; (2) any contingency for costs that are included in the Guaranteed Maximum Price but not otherwise allocated to another line item or included in a Change Order; and (3) the Contractor's Fee.

§ 12.1.5.1 The schedule of values shall be prepared in such form and supported by such data to substantiate its accuracy as the Architect or the Owner may require. The schedule of values shall be used as a basis for reviewing the Contractor's Applications for Payment.

§ 12.1.5.2 The allocation of the Guaranteed Maximum Price under this Section 12.1.5 shall not constitute a separate guaranteed maximum price for the Cost of the Work of each individual line item in the schedule of values.

§ 12.1.5.3 When the Contractor allocates costs from a contingency to another line item in the schedule of values, the Contractor shall submit supporting documentation to the Architect and the Owner in accordance with the requirements of the Contract Documents.

§ 12.1.6 Applications for Payment shall show the percentage of completion of each portion of the Work as of the end of the period covered by the Application for Payment. The percentage of completion shall be the lesser of (1) the percentage of that portion of the Work which has actually been completed; or (2) the percentage obtained by dividing (a) the expense that has actually been incurred by the Contractor on account of that portion of the Work and for which the Contractor has made payment or intends to make payment prior to the next Application for Payment, by (b) the share of the Guaranteed Maximum Price allocated to that portion of the Work in the schedule of values.

§ 12.1.7 In accordance with AIA Document A201–2017 and subject to other provisions of the Contract Documents, the amount of each progress payment shall be computed as follows:

§ 12.1.7.1 The amount of each progress payment shall first include:

- 1 That portion of the Guaranteed Maximum Price properly allocable to completed Work as determined by multiplying the percentage of completion of each portion of the Work by the share of the Guaranteed Maximum Price allocated to that portion of the Work in the most recent schedule of values;
- 2 That portion of the Guaranteed Maximum Price properly allocable to materials and equipment delivered and suitably stored at the site for subsequent incorporation in the completed construction or, if approved in writing in advance by the Owner, suitably stored off the site at a location agreed upon in writing;
- 3 That portion of Construction Change Directives that the Owner determines to be included; and
- 4 The Contractor's Fee, computed upon the Cost of the Work described in the preceding Sections 12.1.7.1.1 and 12.1.7.1.2 at the rate stated in Section 5.1.1 or, if the Contractor's Fee is stated as a fixed sum in that Section, an amount that bears the same ratio to that fixed-sum fee as the Cost of the Work included in Sections 12.1.7.1.1 and 12.1.7.1.2 bears to a reasonable estimate of the probable Cost of the Work upon its completion.

§ 12.1.7.2 The amount of each progress payment shall then be reduced by:

- 1 The aggregate of any amounts previously paid by the Owner;
- 2 The amount, if any, for Work that remains uncorrected and for which the Architect has previously withheld a Certificate for Payment as provided in Article 9 of AIA Document A201–2017;
- 3 Any amount for which the Contractor does not intend to pay a Subcontractor or material supplier, unless the Work has been performed by others the Contractor intends to pay;
- 4 For Work performed or defects discovered since the last payment application, any amount for which payment may be withheld, or a Certificate of Payment nullified in whole or in part, as provided in Article 9 of AIA Document A201–2017;

- .5 The shortfall, if any, indicated by the Contractor in the documentation required by Section 12.1.4 to substantiate prior Applications for Payment, or resulting from errors subsequently discovered by the Owner's auditors in such documentation;
- .6 Other amounts properly held or deducted by the Owner at the time of each Progress Payment; and
- .7 Retainage withheld pursuant to Section 12.1.8.

**§ 12.1.8 Retainage**

**§ 12.1.8.1** For each progress payment made prior to Substantial Completion of the Work, the Owner may withhold the following amount, as retainage, from the payment otherwise due:

*(Insert a percentage or amount to be withheld as retainage from each Application for Payment. The amount of retainage may be limited by governing law.)*

«ten percent (10%) »

**§ 12.1.8.1.1** The following items are not subject to retainage:

*(Insert any items not subject to the withholding of retainage, such as general conditions, insurance, etc.)*

« »

**§ 12.1.8.2** Reduction or limitation of retainage, if any, shall be as follows:

*(If the retainage established in Section 12.1.8.1 is to be modified prior to Substantial Completion of the entire Work, insert provisions for such modification.)*

« The Owner shall have the option but not the obligation to reduce the retention requirements of the Contract or release any portion of retention prior to the date specified in the Contract. Exercise of this option by the Owner shall not be a waiver of any of the Owner's rights to retention in connection with other payments to the Contractor and shall be subject to the approval of Lenders to the Work.

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**§ 12.1.8.3 INTENTIONALLY DELETED.**

*(Insert any other conditions for release of retainage, such as upon completion of the Owner's audit and reconciliation, upon Substantial Completion.)*

« »

**§ 12.1.9 INTENTIONALLY DELETED**

**§ 12.1.10** Except with the Owner's prior written approval, the Contractor shall not make advance payments to suppliers for materials or equipment which have not been delivered and suitably stored at the site.

**§ 12.1.11** The Owner and the Contractor shall agree upon a mutually acceptable procedure for review and approval of payments to Subcontractors, and the Contractor shall execute subcontracts in accordance with those agreements. Except with Owner's prior written approval, payments to Subcontractors shall be subject to a retainage of not less than ten percent (10%).

**§ 12.1.12** In taking action on the Contractor's Applications for Payment the Architect shall be entitled to rely on the accuracy and completeness of the information furnished by the Contractor, and such action shall not be deemed to be a representation that (1) the Architect has made a detailed examination, audit, or arithmetic verification, of the documentation submitted in accordance with Section 12.1.4 or other supporting data; (2) that the Architect has made exhaustive or continuous on-site inspections; or (3) that the Architect has made examinations to ascertain how or for what purposes the Contractor has used amounts previously paid on account of the Contract. Such examinations, audits, and verifications, if required by the Owner, will be performed by the Owner's auditors acting in the sole interest of the Owner.

**§ 12.2 Final Payment**

**§ 12.2.1** Final payment, constituting the entire unpaid balance of the Contract Sum, shall be made by the Owner to the Contractor when

- .1 the Contractor has fully performed the Contract, except for the Contractor's responsibility to correct Work as provided in Article 12 of AIA Document A201-2017, and to satisfy other requirements, if any, which extend beyond final payment;
- .2 the Contractor has submitted a final accounting for the Cost of the Work and a final Application for Payment;
- .3 a final Certificate for Payment has been issued by the Architect in accordance with Section 12.2.2 and approved by the Owner; and
- .4 all conditions set forth in Section 9.10.2. of AIA Document A201-2017, as modified, have been satisfied.

§ 12.2.2 Contractor acknowledges that the Owner may conduct an audit of the Cost of the Work at any time including at the request of Lenders to the Project pursuant to Article 11. .

§ 12.2.2.1 INTENTIONALLY DELETED

§ 12.2.2.2 INTENTIONALLY DELETED

§ 12.2.2.3 INTENTIONALLY DELETED

§ 12.2.3 The Owner's final payment to the Contractor shall be made in accordance with Section 9.10.2 of AIA Document A201 2017 as modified by Owner. « »

§ 12.2.4 INTENTIONALLY DELETED.

§ 12.3 INTENTIONALLY DELETED

## ARTICLE 13 DISPUTE RESOLUTION

§ 13.1 INTENTIONALLY DELETED

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### § 13.2 Binding Dispute Resolution

For any Claim subject to, but not resolved by mediation pursuant to Article 15 of AIA Document A201-2017, the method of binding dispute resolution shall be as follows:

(Check the appropriate box.)

Arbitration pursuant to Section 15 of AIA Document A201-2017, and subject to the limitations set forth therein

Litigation in a court of competent jurisdiction, if not subject to arbitration

Other (Specify)

« »

If the Owner and Contractor do not select a method of binding dispute resolution, or do not subsequently agree in writing to a binding dispute resolution method other than litigation, Claims will be resolved by litigation in a court of competent jurisdiction.

## ARTICLE 14 TERMINATION OR SUSPENSION

### § 14.1 Termination

§ 14.1.1 The Contract may be terminated by the Owner or the Contractor as provided in Article 14 of AIA Document A201-2017.

**§ 14.1.2 Termination by the Owner for Cause**

**§ 14.1.2.1** If the Owner terminates the Contract for cause as provided in Article 14 of AIA Document A201–2017, the amount, if any, to be paid to the Contractor under Article 14 of AIA Document A201–2017 shall not cause the Guaranteed Maximum Price to be exceeded, nor shall it exceed an amount calculated as follows:

- .1 Take the Cost of the Work incurred by the Contractor to the date of termination;
- .2 Add the Contractor’s Fee, computed upon the Cost of the Work to the date of termination at the rate stated in Section 5.1.1 or, if the Contractor’s Fee is stated as a fixed sum in that Section, an amount that bears the same ratio to that fixed-sum Fee as the Cost of the Work at the time of termination bears to a reasonable estimate of the probable Cost of the Work upon its completion;
- .3 Subtract the aggregate of previous payments made by the Owner, any accrued but unpaid liquidated damages amount due, an amount equal to 150% of the liens recorded against the Work or the Site, the amount of any payments intended for unfinished work, and any other amount withheld by Owner pursuant to the Contract Documents; and
- .4 Subtract the costs and damages incurred, or to be incurred, by the Owner under Article 14 of AIA Document A201–2017.

**§ 14.1.2.2** The Owner shall also pay the Contractor fair compensation, either by purchase or rental at the election of the Owner, for any equipment owned by the Contractor that the Owner elects to retain and that is not otherwise included in the Cost of the Work under Section 14.1.2.1.1. To the extent that the Owner elects to take legal assignment of subcontracts and purchase orders (including rental agreements), the Contractor shall, as a condition of receiving the payments referred to in this Article 14, execute and deliver all such papers and take all such steps, including the legal assignment of such subcontracts and other contractual rights of the Contractor, as the Owner may require for the purpose of fully vesting in the Owner the rights and benefits of the Contractor under such subcontracts or purchase orders.

**§ 14.1.3 INTENTIONALLY DELETED**

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**§ 14.2 Suspension**

The Work may be suspended by the Owner as provided in Article 14 of AIA Document A201–2017; in such case, the Guaranteed Maximum Price and Contract Time may be increased if so provided in Article 14 of AIA Document A201–2017, except that the term “profit” shall be understood to mean the Contractor’s Fee as described in Article 5 and Section 6.4 of this Agreement.

**ARTICLE 15 MISCELLANEOUS PROVISIONS**

**§ 15.1** Where reference is made in this Agreement to a provision of AIA Document A201–2017 or another Contract Document, the reference refers to that provision as amended or supplemented by other provisions of the Contract Documents.

**§ 15.2** The Owner’s representative:  
*(Name, address, email address and other information)*

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**§ 15.3** The Contractor’s representative:  
*(Name, address, email address and other information)*

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§ 15.4 Neither the Owner's nor the Contractor's representative shall be changed without ten days' prior notice to the other party.

§ 15.5 Insurance and Bonds

§ 15.5.1 The Owner and the Contractor shall purchase and maintain insurance as set forth in AIA Document A102™–2017, Standard Form of Agreement Between Owner and Contractor where the basis of payment is the Cost of the Work Plus a Fee with a Guaranteed Maximum Price, Exhibit A, Insurance and Bonds, and elsewhere in the Contract Documents.

§ 15.5.2 The Contractor shall provide bonds as set forth in AIA Document A102™–2017 Exhibit A, and elsewhere in the Contract Documents. The bonds shall be in recordable form and shall name [\_\_\_\_\_] as co-obligees or assignees.

§ 15.6 Notice in electronic format, pursuant to Article 1 of AIA Document A201–2017 shall be provided to the Owner's and Contractor's representatives at the email addresses listed above.

§ 15.7 Other provisions:

«§ 15.7.1 Contractor Representations. The Contractor represents and warrants the following to the Owner (in addition to any other representations and warranties contained in the Contract Documents) as a material inducement to the Owner to execute this Agreement, which representations and warranties shall survive the execution and delivery of this Agreement and any termination of this Agreement:

- .1 The Contractor and its Subcontractors are financially solvent, able to pay all debts as they mature, and possessed of sufficient working capital to complete the Work and perform all obligations hereunder;
- .2 The Contractor is able to furnish the plant, tools, materials, supplies, equipment, and labor itself or through its Subcontractors required to complete the Work and perform its obligations hereunder, and has sufficient experience and competence to do so;
- .3 The Contractor is authorized to do business in the State of California and is properly licensed by all necessary governmental and public and quasi-public authorities having jurisdiction over the Contractor and over the Work and the Project;
- .4 The Contractor's execution of this Agreement and performance thereof is within the Contractor's duly authorized powers;
- .5 The Contractor is a sophisticated contractor who possesses a high level of experience and expertise in the business administration, construction, construction management, and superintendence of projects of the size, complexity, and nature of this particular Project, and will perform the Work with the care, skill, and diligence of such a Contractor;
- .6 Except as disclosed to Owner in writing, there are no claims, actions, investigations, suits, or proceedings pending affecting Contractor's performance under the Contract Documents; and
- .7 All financial information delivered to Owner, including all information relating to the financial condition of the Contractor or any of its partners, joint venturers, or members (as applicable), fairly and accurately represents the financial condition being reported on as of its date. All such information is prepared in accordance with generally accepted accounting principles consistently applied, unless otherwise noted. There has been no material adverse change in the financial condition of any of the persons described above-reported at any time to Owner, except as previously disclosed to Owner in writing in later financial information and found acceptable to Owner in its sole and absolute discretion.

- .8 Neither Contractor nor its principals, as defined at 49 CFR 29.995, and to the best of Contractor's knowledge, nor any of its subcontractors, are debarred, suspended, proposed for debarment, declared ineligible, or voluntarily excluded from participation in the Project by any federal department of agency.

**§ 15.7.2 Contractor Notifications.** Contractor shall notify Owner promptly in writing of any and all of the following:

- .1 Any litigation or claim of any kind affecting or relating to Contractor or its subsidiaries or any material subcontractor where the amount claimed is or maybe one hundred Thousand Dollars (\$100,000) or more whether covered by insurance or not.
- .2 Any termination of a construction contract to which Contractor is a party.
- .3 Any default or potential default of a Subcontractor or material supplier (including without limitation, its inability to maintain its schedule).
- .4 Any material adverse change in Contractor's or any Material Subcontractor's financial condition, any material adverse change in Contractor's or any Material Subcontractor's operations, or any change in the management of Contractor or any Material Subcontractors.
- .5 Any other circumstance, event, or occurrence that results in a material adverse change in Contractor's or any Material Subcontractor's ability to timely perform any of its obligations under any of the Contract Documents.

For the purposes of this Section, "Material Subcontractor" means a subcontractor performing greater than \$150,000 of work on the Project.

**§ 15.7.3 Lender and Investor Requirements.** The Contractor acknowledges that the Owner is financing the Work with funds from public and/or private lenders and equity investors to the Work as described below (the "Lenders") and that such Lenders have imposed and may impose additional requirements on the Owner, the Contractor, and any Subcontractors including but not limited to approval of change orders, approval prior to release of any payments under the Contract including Progress Payments, Final Payments and payment of retention, and insurance requirements. Applicable requirements of the Lenders are set forth in an Exhibit to this Agreement and are also incorporated into the Agreement. The Contractor agrees to use its best efforts to comply with the requirements of the Lenders that bear upon the performance of the Work. The Contractor shall also: (1) make the site of the Work available at reasonable times for inspection by the Lenders or the Lenders' representatives; (2) consent to and execute all documents reasonably requested by the Owner in connection with the assignment of the Contract Documents to the Lenders for collateral purposes; and (3) promptly furnish the Owner with information, documents, and materials that the Owner may reasonably request from time to time in order to comply with the requirements of the Lenders including but not limited to information necessary to process payments and change orders, and information pertaining to subcontractors.

**§ 15.7.4 Prevailing Wages.**

**.1 Davis Bacon Act Requirements.**

This Project shall be constructed in compliance with the prevailing wage requirements of the federal Davis-Bacon Act as Set forth in an Exhibit to this Agreement, and in accordance with the wage rate determination attached as an Exhibit to this Agreement. A copy of the applicable Davis Bacon wage decision and any additional classifications shall be posted by the Contractor at the work site in a prominent place readily accessible to the workers.

Contractor shall submit to the Owner weekly certified payrolls for each work week from the time work is started until the construction of the Project is completed on Department of Labor Payroll Form WH-347 or equivalent approved by the Owner, and a "Weekly Statement with Respect to the Payment of Wages," using either Department of Labor Form WH-348, or an equivalent form approved by



Owner. Weekly payrolls shall be completed and submitted promptly, no later than seven work days following completion of the work week. Monthly progress payments will not be released until all payroll reports are up to date. Contractor shall, and shall require its subcontractors to maintain certified payrolls, and to submit copies of such certified payrolls to Owner, upon request, in order to verify compliance with these requirements.

The Contractor shall indemnify, hold harmless and defend (with counsel reasonably acceptable to the Owner) the Owner against any claim for damages, compensation, fines, penalties or other amounts to the extent arising out of the failure or alleged failure of any person or entity (including the subcontractors) to pay prevailing wages as determined pursuant to the prevailing wage provisions of the federal Davis-Bacon Act and implementing rules and regulations in connection with the construction of the Project or any other work undertaken or in connection with the Project. Contractor's indemnity obligations shall survive the termination or expiration of the Contract.

## **.2 State Prevailing Wages.**

Construction of the Project is subject to state prevailing wages under California Labor Code ("CLC") Section 1720 et seq. and the implementing regulations of the Department of Industrial Relations (the "DIR"). The Contractor shall and shall cause Subcontractors to pay prevailing wages in the construction of the Project as those wages are determined pursuant to CLC Section 1720 et seq., to employ apprentices as required by CLC Sections 1777.5 - 1777.7 and the implementing regulations of DIR, and comply with all other applicable provisions of CLC Section 1720 et seq., and implementing regulations of the DIR. The Contractor shall and shall cause Subcontractors to keep and retain such records as are necessary to determine if such prevailing wages have been paid as required pursuant to CLC Section 1720 et seq., and apprentices have been employed as required by CLC Sections 1777.5 - 1777.7. Pursuant to CLC Section 1727 the Owner may withhold from the Contractor all amounts required to satisfy any civil wage and penalty assessment issued by DIR.

All subcontracts shall include the requirements set forth in CLC 1720 et seq. including a copy of the CLC Sections listed in CLC Section 1775(b)(1).

Pursuant to CLC Section 1771.1, the Contractor shall and shall cause all Subcontractors to register with the DIR in accordance with CLC Section 1725.5, and shall maintain such registration until the Owner's release of final payment. Notice of this registration requirement shall be included in all invitations to bid and a bid shall not be accepted or any contract or subcontract entered into without proof of registration pursuant to CLC Section 1725.5. The Contractor shall provide the Owner evidence of its registration and the registration of all Subcontractors including all registration numbers, the name of all Subcontractors, and any other information requested by the Owner in order to comply with CLC Section 1777.3(a) prior to the first day on which the Contractor has workers employed on the site. The Owner may withhold final payment due until at least thirty (30) days after all information required by CLC Section 1777.3(a)(2) has been received by the Owner. Unregistered contractors and subcontractors are subject to penalties and stop orders pursuant to CLC Section 1725.5.

Pursuant to CLC Section 1771.4, construction of the Project is also subject to compliance monitoring and enforcement by the DIR. The Contractor shall and shall cause Subcontractors to keep accurate payrolls and shall submit payroll and other records to the DIR as required by CLC Section 1776 et seq., or in such other format as required by the DIR. The Contractor shall monitor payment of prevailing wages by Subcontractors by periodic review of the certified payroll records of Subcontractors and take corrective action if necessary in accordance with CLC Section 1775(b).

During the construction of the Project, the Contractor shall post at the property the applicable prevailing rates of per diem wages, and shall post job site notices in compliance with Title 8 California Code of Regulations 16451(d), or otherwise as required by the DIR. Copies of the currently applicable current per diem prevailing wages are available from the DIR website, [www.dir.ca.gov](http://www.dir.ca.gov). The Contractor shall also comply with the working hours requirements set forth in CLC Sections 1810-1815.

Contractor shall indemnify, hold harmless and defend (with counsel reasonably acceptable to the Owner) the Owner against any claim for damages, compensation, fines, penalties or other amounts arising out of the failure or alleged failure of the Contractor, Subcontractors, or any person they are responsible for, to

pay prevailing wages as determined pursuant to CLC Section 1720 et seq., to employ apprentices pursuant to CLC Sections 1777.5 – 1777.7, or comply with all other applicable provisions of CLC Section 1720 et seq., CLC Sections 1810-1815, and implementing regulations of the DIR in connection with construction of the Project. The Contractor's indemnity obligations shall survive the termination or expiration of this Contract.

Contractor, shall, if requested by Owner, provide to Owner or Owner's lenders documentation evidencing the proper payment of prevailing wages and maintenance of labor records as required by the applicable requirements.

Additional Prevailing Wage requirements may be set forth in the Lender Requirements attached to this Agreement as an Exhibit.

### § 15.7.5 Section 3 Requirements.

The work performed under this contract is subject to the requirements of Section 3 of the Housing and Urban Development Act of 1968, as amended, 12 U.S.C. 1701u ("Section 3"). The purpose of Section 3 is to ensure that employment and other economic opportunities generated by Department of Housing and Urban Development (HUD) assistance or HUD-assisted projects covered by Section 3, shall to the greatest extent feasible, be directed to low- and very-low income persons, particularly persons who are recipients of HUD assistance for housing.

(1) The Contractor agrees to comply with HUD's regulations in 24 CFR Part 75, which implement Section 3. As evidenced by its execution of this contract, the contractor certifies that it is under no contractual or other impediment that would prevent it from complying with the Section 3 regulations.

(2) Pursuant to Section 3, to the greatest extent feasible, and consistent with existing Federal, state, and local laws and regulations Contractor shall ensure:

(A) that employment and training opportunities arising in connection with the Project are provided to Section 3 workers within the metropolitan area (or nonmetropolitan county) in which the Project is located. Where feasible, priority for opportunities and training described above should be given to: (i) Section 3 workers residing within the service area or the neighborhood of the project, and (ii) participants in YouthBuild programs; and

(B) that contracts for work awarded in connection with the Project are provided to business concerns that provide economic opportunities to Section 3 workers residing within the metropolitan area (or nonmetropolitan county) in which the Project is located. Where feasible, priority for opportunities and training described above should be given to: (i) Section 3 business concerns that provide economic opportunities to Section 3 workers residing within the service area or the neighborhood of the Project, and (ii) participants in YouthBuild programs.

(3) Contractor will be considered to have complied with the Section 3 requirements, in the absence of evidence to the contrary, if it certifies that it has followed the prioritization of effort set forth in subsection (1) above, and meets or exceeds the applicable Section 3 benchmark as described in 24 C.F.R. 75.23(b).

(4) Contractor shall maintain records of its Section 3 activities and cause such records to be accurate and current and in a form that allows the Owner to comply with the reporting requirements of 24 C.F.R. 75.25.

(5) Contractor shall require all subcontractors performing work on the Project to comply with the Section 3 requirements.

(6) Noncompliance with Section 3 requirements may result in sanctions, termination of this contract for default, and debarment or suspension from future HUD-assisted contracts.

**§ 15.7.6 Nondiscrimination.** Contractor shall comply with the following nondiscrimination requirements: Title VI of the Civil Rights Act of 1964 as amended; Title VIII of the Civil Rights Act of 1968 as amended; Section 104(b) and Section 109 of Title I of the Housing and Community Development Act of 1974 as amended; Section 504 of the Rehabilitation Act of 1973 (29 USC 794, et seq.); the Age Discrimination Act of 1975 (42 USC 6101, et seq.); Executive Order 11063 as amended by Executive Order 12259 and implementing regulations at 24 C.F.R. Part 107; Executive Order 11246 as amended by Executive Orders 11375, 12086, 11478, 12107; Executive Order 11625 as amended by Executive Order 12007; Executive Order 12432; Executive Order 12138 as amended by Executive Order 12608. During the performance of the Contract, the Contractor assures that no otherwise qualified person shall be

excluded from participation or employment, denied program benefits, or be subjected to discrimination based on race, color, national origin, sex, age, or disability, under any work performed pursuant to the Contract, as required by the laws set forth above and all implementing regulations.

**§ 15.7.7 Equal Employment Opportunity.** During the performance of this contract, the contractor agrees as follows:

(1) The Contractor will not discriminate against any employee or applicant for employment because of race, color, creed, religion, sex, or national origin. The contractor will take affirmative action to ensure that applicants are employed, and that employees are treated during employment, without regard to their race, color, religion, creed, sex, or national origin. Such action shall include, but not be limited to, the following: employment, upgrading, demotion, or transfer; recruitment or recruitment advertising; layoffs or termination; rates of pay or other forms of compensation; and selection for training, including apprenticeship. The Contractor agrees to post in conspicuous places, available to employees and applicants for employment, notices to be provided by the contracting officer setting forth the provisions of this nondiscrimination clause.

(2) The Contractor will, in all solicitations or advertisements for employees placed by or on behalf of the contractor, state that all qualified applicants will receive consideration for employment without regard to race, color, religion, creed, sex, or national origin.

(3) The Contractor will send to each labor union or representative of workers with which the Contractor has a collective bargaining agreement or other contract or understanding, a notice to be provided by or at the direction of the Government advising the labor union or workers representative of the Contractor's commitments under this section, and shall post copies of the notice in conspicuous places available to employees and applicants for employment.

(4) The Contractor will comply with all provisions of Executive Order No. 11246 of September 24, 1965, and with the rules, regulations, and relevant orders of the Secretary of Labor.

(5) The Contractor will furnish all information and reports required by Executive Order No. 11246 of September 24, 1965, and by the rules, regulations, and orders of the Secretary of Labor, or pursuant thereto, and will permit access to its books, records, and accounts by HUD and the Secretary of Labor for purposes of investigation to ascertain compliance with such rules, regulations and orders.

(6) In the event of the Contractor's noncompliance with the nondiscrimination clauses of this Contract or with any of the rules, regulations, or orders, the Contract may be canceled, terminated, or suspended in whole or in part and the Contractor may be declared ineligible for further contracts in accordance with procedures authorized in Executive Order No. 11246 of September 24, 1965, and such other sanctions as may be imported and remedies invoked as provided in Executive Order No. 11246 of September 24, 1965, or by rule, regulation, or order of the Secretary of Labor or as otherwise provided by law.

(7) The Contractor will include the provisions of paragraphs (1) through (7) in every subcontract or purchase order unless exempted by the rules, regulations, or orders of the Secretary of Labor issued pursuant to section 204 of Executive Order No. 11246 of September 24, 1965, so that such provisions will be binding upon each subcontractor or vendor. The Contractor will take such action with respect to any subcontract or purchase order as the Government may direct as a means of enforcing such provisions including sanctions for noncompliance; provided, however, that in the event a contractor becomes involved in, or is threatened with, litigation with a subcontractor or vendor as a result of such direction by the

Government, the contractor may request the United States to enter into such litigation to protect the interest of the United States.

**§ 15.7.8 Lead-based Paint.** Contractor shall comply with the requirements of the Lead-Based Paint Poisoning Prevention Act, as amended (42 U.S.C. 4821 et seq.), the Residential Lead-Based Paint Hazard Reduction Act (42 U.S.C. 4851 et seq.), and implementing regulations at 24 C.F.R. Part 35.

**§ 15.7.9 Conditions of Approval/Mitigation Measures.** Contractor shall comply with the Conditions of Approval/Mitigation Requirements set forth in an Exhibit to this Agreement.

**§ 15.7.10 Entire Agreement/Amendment.** This Agreement (which includes any exhibits, riders or schedules attached hereto) constitutes the entire agreement between the parties and there are no other agreements, understandings, representations or warranties, oral or written, relating to the subject matter hereof between the parties. The parties to this Contract have read and reviewed this Contract and agree that any rule of construction to the effect that ambiguities are to be resolved against the drafting party (including, but not limited to, Civil Code Section 1654) shall not apply to this Contract. This Agreement may not be amended, changed or modified, in whole or in part, except in writing, signed by both parties.

**§ 15.7.11 Counterparts.** This Agreement may be executed in one or more counterparts, each of which shall be deemed to be an original, but all of which together shall constitute but one and the same instrument.

**§ 15.7.12 California Business and Professions Code Section 7030:**

CONTRACTORS ARE REQUIRED BY LAW TO BE LICENSED AND REGULATED BY THE CONTRACTORS' STATE LICENSE BOARD WHICH HAS JURISDICTION TO INVESTIGATE COMPLAINTS AGAINST CONTRACTORS IF A COMPLAINT REGARDING A PATENT ACT OR OMISSION IS FILED WITHIN FOUR YEARS OF THE DATE OF THE ALLEGED VIOLATION. A COMPLAINT REGARDING A LATENT ACT OR OMISSION PERTAINING TO STRUCTURAL DEFECTS MUST BE FILED WITHIN 10 YEARS OF THE DATE OF THE ALLEGED VIOLATION. ANY QUESTIONS CONCERNING A CONTRACTOR MAY BE REFERRED TO THE REGISTRAR, CONTRACTORS' STATE LICENSE BOARD, P.O. BOX 26000, SACRAMENTO, CA 95826.

»

## ARTICLE 16 ENUMERATION OF CONTRACT DOCUMENTS

**§ 16.1** This Agreement is comprised of the following documents:

- .1 AIA Document A102™-2017, Standard Form of Agreement Between Owner and Contractor
- .2 AIA Document A102™-2017, Exhibit A, Insurance and Bonds
- .3 AIA Document A201™-2017, General Conditions of the Contract for Construction
- .4

*(Insert the date of the E203-2013 incorporated into this Agreement.)*

« »

- .5 Drawings

Number	Title	Date
« »		

- .6 Specifications

Section	Title	Date	Pages
« »			

- .7 Addenda, if any:

Number	Date	Pages
« »		

Portions of Addenda relating to bidding or proposal requirements are not part of the Contract Documents unless the bidding or proposal requirements are also enumerated in this Article 16.

**.8 Other Exhibits:**  
(Check all boxes that apply.)

[  ] (Insert the date of the E204-2017 incorporated into this Agreement.)

[  ]

Title	Date	Pages
<input type="text"/>	<input type="text"/>	<input type="text"/>

[  ] Supplementary and other Conditions of the Contract:

Document	Title	Date	Pages
<input type="text"/>	<input type="text"/>	<input type="text"/>	<input type="text"/>

**.9 Other documents, if any, listed below:**

(List here any additional documents that are intended to form part of the Contract Documents. AIA Document A201–2017 provides that the advertisement or invitation to bid, Instructions to Bidders, sample forms, the Contractor’s bid or proposal, portions of Addenda relating to bidding or proposal requirements, and other information furnished by the Owner in anticipation of receiving bids or proposals, are not part of the Contract Documents unless enumerated in this Agreement. Any such documents should be listed here only if intended to be part of the Contract Documents.)

- « Exhibit A: AIA Document A102™–2017, Insurance and Bonds
- Exhibit B: Contractor’s Schedule of Values
- Exhibit C: Contractor’s Qualifications and Exclusions
- Exhibit D: Construction Schedule
- Exhibit E: Drawings and Specifications (list)
- Exhibit F: Lender & Investor Requirements
- Exhibit G: Conditions of Approval/Mitigation Requirements
- Exhibit H: Federal Labor Standards [If Applicable]
- Exhibit I: Prevailing Wage Determination [If Applicable]
- Exhibit J: Design-Build Work [If Applicable]
- Exhibit K: OCIP Requirements [May Require initials & execution]

This Agreement entered into as of the day and year first written above.

« »  
\_\_\_\_\_  
**OWNER (Signature)**  
« »  
\_\_\_\_\_  
(Printed name and title)

« »  
\_\_\_\_\_  
**CONTRACTOR (Signature)**  
« »  
\_\_\_\_\_  
(Printed name and title)

# DRAFT AIA® Document A201™ - 2017

## General Conditions of the Contract for Construction

for the following PROJECT:

(Name and location or address)

»  
« »

THE OWNER:

(Name, legal status and address)

« »« »  
« »

THE ARCHITECT:

(Name, legal status and address)

« »« »  
« »

[To be used with AIA Document A102™-2017 or A101™-2017, Exhibit A, Insurance and Bonds]

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- 1 GENERAL PROVISIONS
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- 14 TERMINATION OR SUSPENSION OF THE CONTRACT
- 15 CLAIMS AND DISPUTES

**ADDITIONS AND DELETIONS:** The author of this document has added information needed for its completion. The author may also have revised the text of the original AIA standard form. An *Additions and Deletions Report* that notes added information as well as revisions to the standard form text is available from the author and should be reviewed.

This document has important legal consequences. Consultation with an attorney is encouraged with respect to its completion or modification.

For guidance in modifying this document to include supplementary conditions, see AIA Document A503™, Guide for Supplementary Conditions.



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## ARTICLE 1 GENERAL PROVISIONS

### § 1.1 Basic Definitions

#### § 1.1.1 The Contract Documents

The Contract Documents are enumerated in the Agreement between the Owner and Contractor (hereinafter the Agreement) and consist of the Agreement, Conditions of the Contract (General, Supplementary and other Conditions), Drawings, Specifications, Addenda issued prior to execution of the Contract, other documents listed in the Agreement, and Modifications issued after execution of the Contract. A Modification is (1) a written amendment to the Contract signed by both parties, (2) a Change Order, (3) a Construction Change Directive, or (4) a written order for a minor change in the Work issued by the Architect. Unless specifically enumerated in the Agreement, the Contract Documents do not include the advertisement or invitation to bid, Instructions to Bidders, sample forms, other information furnished by the Owner in anticipation of receiving bids or proposals, the Contractor's bid or proposal, or portions of Addenda relating to bidding or proposal requirements. Each party hereto agrees to do all acts and things and to make, execute and deliver such written instruments, as shall from time to time be reasonably required to carry out the terms and provisions of the Contract Documents.

#### § 1.1.2 The Contract

The Contract Documents form the Contract for Construction. The Contract represents the entire and integrated agreement between the parties hereto and supersedes prior negotiations, representations, or agreements, either written or oral. The Contract may be amended or modified only by a Modification. Nothing expressed or implied in the Contract is intended or shall be construed to confer upon or give any person or entity, others than the parties hereto, any right or remedies under or by reason of the Contract. The Contract Documents shall not be construed to create a contractual relationship of any kind (1) between the Contractor and the Architect or the Architect's consultants, (2) between the Owner and a Subcontractor or a Sub-subcontractor, (except the Owner's status as a third-party beneficiary under subcontracts as set forth in Section 5.3), (3) between the Owner and the Architect or the Architect's consultants, or (4) between any persons or entities other than the Owner and the Contractor. The Architect shall, however, be entitled to performance and enforcement of obligations under the Contract intended to facilitate performance of the Architect's duties, however, the parties to this Contract do not intend that the Architect be a third party beneficiary of this Contract.

#### § 1.1.3 The Work

The term "Work" means the construction and services required by the Contract Documents, whether completed or partially completed, and includes all other labor, materials, equipment, and services provided or to be provided by the Contractor to fulfill the Contractor's obligations. The Work may constitute the whole or a part of the Project.

#### § 1.1.4 The Project

The Project is the total construction of which the Work performed under the Contract Documents may be the whole or a part and which may include construction by the Owner and by Separate Contractors.

#### § 1.1.5 The Drawings

The Drawings are the graphic and pictorial portions of the Contract Documents showing the design, location and dimensions of the Work, generally including plans, elevations, sections, details, schedules, and diagrams. Drawings are partly diagrammatic and may not show each and every piece of required material needed for completed installation. Drawings show the general arrangement, design and extent of the Work. Construction not detailed or specified shall be equal or similar to adjacent detailed or specified construction. All manufactured items of one specified type or items to be used for similar purposes shall be by one manufacturer and of identical finish and design appearance. In cases where a later model or product has superseded that specified, the superseding replacement model shall be installed. All products shall be installed consistent with the manufacturer's directions and instructions. Any manufacturer's installation instructions which are inconsistent with the requirements of the Contract Documents shall be promptly brought to the attention of the Owner.

#### § 1.1.6 The Specifications

The Specifications are that portion of the Contract Documents consisting of the written requirements for materials, equipment, systems, standards and workmanship for the Work, and performance of related services.

#### § 1.1.7 Instruments of Service

Instruments of Service are representations, in any medium of expression now known or later developed, of the tangible and intangible creative work performed by the Architect and the Architect's consultants under their respective

professional services agreements. Instruments of Service may include, without limitation, studies, surveys, models, sketches, drawings, specifications, and other similar materials.

### § 1.1.8 INTENTIONALLY DELETED

### § 1.2 Correlation and Intent of the Contract Documents

§ 1.2.1 The intent of the Contract Documents is to include all items necessary for the proper execution and completion of the Work by the Contractor. The Contract Documents are complementary, and what is required by one shall be as binding as if required by all; performance by the Contractor shall be required only to the extent consistent with the Contract Documents and reasonably inferable from them as being necessary to produce the indicated results. In the event of inconsistencies within or between parts of the Contract Documents or between Contract Documents and applicable laws, statutes, codes, ordinances, rules and regulations of federal, state, city or municipal governments or agencies now in force or that may be enacted hereafter, the Contractor shall comply with the more stringent requirements.

§ 1.2.1.1 Titles of articles, paragraphs and subparagraphs are for convenience only and neither limit nor amplify the provisions of this Contract in itself. Wherever possible, each provision of the Contract shall be interpreted in a manner as to be effective and valid under applicable law. The invalidity of any provision of the Contract Documents shall not invalidate the Contract or its remaining provisions. If it is determined that any provision of the Contract Documents violates any law, or is otherwise invalid or unenforceable, then that provision shall be revised to the extent necessary to make that provision legal and enforceable. In such case the Contract Documents shall be construed, to the fullest extent permitted by law, to give effect to the parties' intentions and purposes in executing the Contract.

§ 1.2.2 Organization of the Specifications into divisions, sections and articles, and arrangement of Drawings shall not control the Contractor in dividing the Work among Subcontractors or in establishing the extent of Work to be performed by any trade.

§ 1.2.3 Unless otherwise stated in the Contract Documents, words that have well-known technical or construction industry meanings are used in the Contract Documents in accordance with such recognized meanings.

§ 1.2.4 The terms "knowledge," "recognize," and "discover," their respective derivatives, and similar terms in the Contract Documents, as used in reference to the Contractor shall be interpreted to mean that which the Contractor knows (or should know), recognizes (or should recognize), and discovers (or should discover) in exercising the care, skill, and diligence required by the Contract Documents. Analogously, the expression "reasonably inferable" and similar terms in the Contract Documents shall be interpreted to mean reasonably inferable by a contractor familiar with the Project and exercising the care, skill, and diligence required of the Contractor by the Contract Documents.

### § 1.3 Capitalization

Terms capitalized in these General Conditions include those that are (1) specifically defined, (2) the titles of numbered articles, or (3) the titles of other documents published by the American Institute of Architects.

### § 1.4 Interpretation

In the interest of brevity the Contract Documents frequently omit modifying words such as "all" and "any" and articles such as "the" and "an," but the fact that a modifier or an article is absent from one statement and appears in another is not intended to affect the interpretation of either statement.

### § 1.5 Ownership and Use of Drawings, Specifications, and Other Instruments of Service

§ 1.5.1 With respect to the Contractor's use of the Architect's Instruments of Service, the Architect and the Architect's consultants shall be deemed the authors and owners of their respective Instruments of Service, including the Drawings and Specifications, and retain all common law, statutory, and other reserved rights in their Instruments of Service, including copyrights. The rights of the Architect with respect to the Architect's Instruments of Service are set forth in the agreement between the Owner and the Architect. The Contractor, Subcontractors, Sub-subcontractors, and suppliers shall not own or claim a copyright in the Instruments of Service. Submittal or distribution to meet official regulatory requirements or for other purposes in connection with the Project is not to be construed as publication in derogation of the Architect's or Architect's consultants' reserved rights.

§ 1.5.2 The Contractor, Subcontractors, Sub-subcontractors, and suppliers are authorized to use and reproduce the Instruments of Service provided to them, subject to any protocols established pursuant to Sections 1.7 and 1.8, solely



and exclusively for execution of the Work. All copies made under this authorization shall bear the copyright notice, if any, shown on the Instruments of Service. The Contractor, Subcontractors, Sub-subcontractors, and suppliers may not use the Instruments of Service on other projects or for additions to the Project outside the scope of the Work without the specific written consent of the Owner, Architect, and the Architect's consultants.

## § 1.6 Notice

§ 1.6.1 Except as otherwise provided in Section 1.6.2, where the Contract Documents require one party to notify or give notice to the other party, such notice shall be provided in writing to the designated representative of the party to whom the notice is addressed and shall be deemed to have been duly served if delivered in person, by mail, by courier, or by electronic transmission if a method for electronic transmission is set forth in the Agreement. At Owner's request, a copy of written notices shall be delivered to Lenders to the Work.

§ 1.6.2 Notice of Claims as provided in Section 15.1.3 shall be provided in writing and shall be deemed to have been duly served only if delivered to the designated representative of the party to whom the notice is addressed by certified or registered mail, or by courier providing proof of delivery.

## § 1.7 Digital Data Use and Transmission

The parties shall agree upon protocols governing the transmission and use of Instruments of Service or any other information or documentation in digital form.

## § 1.8 INTENTIONALLY DELETED

## ARTICLE 2 OWNER

### § 2.1 General

§ 2.1.1 The Owner is the person or entity identified as such in the Agreement and is referred to throughout the Contract Documents as if singular in number. The Owner shall designate in writing a representative who shall have express authority to bind the Owner with respect to all matters requiring the Owner's approval or authorization. Except as otherwise provided in Section 4.2.1, the Architect does not have such authority. The term "Owner" means the Owner or the Owner's authorized representative.

§ 2.1.2 The Owner shall furnish to the Contractor, within fifteen days after receipt of a written request, information necessary and relevant for the Contractor to evaluate, give notice of, or enforce mechanic's lien rights. Such information shall include a correct statement of the record legal title to the property on which the Project is located, usually referred to as the site, and the Owner's interest therein.

### § 2.2 Evidence of the Owner's Financial Arrangements

§ 2.2.1 Prior to commencement of the Work and upon written request by the Contractor, the Owner shall furnish to the Contractor reasonable evidence that the Owner has made financial arrangements to fulfill the Owner's obligations under the Contract.

§ 2.2.2 Following commencement of the Work and upon written request by the Contractor, the Owner shall furnish to the Contractor reasonable evidence that the Owner has made financial arrangements to fulfill the Owner's obligations under the Contract only if (1) the Owner fails to make payments to the Contractor as the Contract Documents require; (2) the Contractor identifies in writing a reasonable concern regarding the Owner's ability to make payment when due; or (3) a change in the Work materially changes the Contract Sum. § 2.2.3 INTENTIONALLY DELETED

### § 2.2.4 INTENTIONALLY DELETED

### § 2.3 Information and Services Required of the Owner

§ 2.3.1 Except for permits and fees that are the responsibility of the Contractor under the Contract Documents, including those required under Section 3.7.1, the Owner shall secure and pay for necessary approvals, easements, assessments and charges required for construction, use or occupancy of permanent structures or for permanent changes in existing facilities.

§ 2.3.2 If the Owner has retained an architect lawfully licensed to practice architecture, or an entity lawfully practicing architecture, in the jurisdiction where the Project is located, that person or entity is identified as the Architect in the Agreement and is referred to throughout the Contract Documents as if singular in number.

### § 2.3.3 INTENTIONALLY DELETED

§ 2.3.4 The Owner shall furnish to the Contractor a survey describing the physical location of the site of the Project, and a legal description of the site that the Owner possessed as of the date of execution of the Contract. The Contractor shall be entitled to rely on the accuracy of information furnished by the Owner but shall exercise proper precautions relating to the safe performance of the Work. Receipt of this survey shall not release the Contractor from any duty to conduct a reasonable and customary independent investigation of the site as detailed in the Contract Documents.

§ 2.3.5 The Owner shall furnish information or services required of the Owner by the Contract Documents with reasonable promptness. The Owner shall also furnish any other information or services under the Owner's control and relevant to the Contractor's performance of the Work with reasonable promptness after receiving the Contractor's written request for such information or services.

§ 2.3.6 Unless otherwise provided in the Contract Documents, the Owner shall furnish to the Contractor one copy of the Contract Documents for purposes of making reproductions pursuant to Section 1.5.2.

§ 2.3.7 All information received by the Contractor (including, without limitation, information concerning the nature of Owner's or its affiliate's organization, business, products, services, market research, assets, revenues and any plans or materials prepared for Owner pursuant to, or in connection with, the terms of the Contract) shall be kept confidential by the Contractor and its representatives and shall not be used in any manner by the Contractor or its representatives except in connection with the performance of their duties under the Contract; provided, however, that the Contractor may disclose such information to its employees, Subcontractors, officers, directors or agents to the extent necessary to the performance of its duties under the Contract. The foregoing confidentiality provisions shall not apply to such portions of the information received that are generally available to the public or required by law to be disclosed. The obligations under this paragraph shall survive the expiration or termination of the Contract.

### § 2.4 Owner's Right to Stop the Work

If the Contractor fails to correct Work that is not in accordance with the requirements of the Contract Documents as required by Section 12.2 or fails to carry out Work in accordance with the Contract Documents, the Owner may issue a written order to the Contractor to stop the Work, or any portion thereof, until the cause for such order has been eliminated; however, the right of the Owner to stop the Work shall not give rise to a duty on the part of the Owner to exercise this right for the benefit of the Contractor or any other person or entity, except to the extent required by Section 6.1.3. The Contractor shall not be entitled to any adjustment in Contract Time or Contract Sum as a result of any such order.

### § 2.5 Owner's Right to Carry Out the Work

If the Contractor defaults or neglects to carry out the Work in accordance with the Contract Documents and fails within a five-day period after receipt of notice from the Owner (or within forty-eight (48) hours in the case of health and safety issues) to commence and continue correction of such default or neglect with diligence and promptness, the Owner may, without prejudice to other remedies the Owner may have, correct such default or neglect or may, pursuant to Section 9.5.1, withhold or nullify a Certificate for Payment in whole or in part, or backcharge the Contractor, to the extent reasonably necessary to reimburse the Owner for the reasonable cost of correcting such deficiencies, including but not limited to Owner's expenses and compensation for any additional services of consultants made necessary by such default, neglect, or failure. If current and future payments are not sufficient to cover such amounts, the Contractor shall pay the difference to the Owner. If the Contractor disagrees with the actions of the Owner or the Architect, or the amounts claimed as costs to the Owner, the Contractor may file a Claim pursuant to Article 15.

### § 2.6 EXTENT OF OWNER RIGHTS

§ 2.6.1 The rights stated in this Article 2 and elsewhere in the Contract Documents are cumulative and not in limitation of any rights of the Owner granted in the Contract Documents, at law, or in equity.

§ 2.6.2 In no event shall the Owner have control over, charge of, or any responsibility for construction means, methods, techniques, sequences, or procedures or for safety precautions and programs in connection with the Work, notwithstanding any of the rights and authority granted the Owner in the Contract Documents.

## ARTICLE 3 CONTRACTOR

### § 3.1 General

§ 3.1.1 The Contractor is the person or entity identified as such in the Agreement and is referred to throughout the Contract Documents as if singular in number. The Contractor shall be lawfully licensed, if required in the jurisdiction where the Project is located. The Contractor shall designate in writing a representative who shall have express authority to bind the Contractor with respect to all matters under this Contract. The term "Contractor" means the Contractor or the Contractor's authorized representative.

§ 3.1.2 The Contractor shall perform the Work in accordance with the Contract Documents.

§ 3.1.3 The Contractor shall not be relieved of its obligations to perform the Work in accordance with the Contract Documents either by activities or duties of the Architect in the Architect's administration of the Contract, or by tests, inspections or approvals required or performed by persons or entities other than the Contractor.

### § 3.2 Review of Contract Documents and Field Conditions by Contractor

§ 3.2.1 Execution of the Contract by the Contractor is a representation by the Contractor that, prior to the commencement of the Work, the Contractor has made an inspection of the site and existing conditions (or was provided an opportunity by Owner to make such inspection) to the extent applicable to the performance of the Work and as necessary to establish the Contract Sum and Contract Time, including but not limited to (i) the physical conditions of the site including soil and ground conditions, existing underground utilities, and all structures located on the site; (ii) conditions of existing improvements that will be rehabilitated as part of the Project to the extent the existing improvements have been made available to Contractor by Owner (provided that the parties acknowledge that if the Work involves the rehabilitation of portions of existing improvements that any conditions identified by Contractor in the areas made available by Owner for inspection, that similar conditions are likely to be found in the portions of the existing improvements not inspected by the Contractor), (iii) all conditions and structures on adjoining properties; (iv) the nature and location of the general area including prevailing weather conditions; (v) the availability and cost of labor, equipment, materials, and supplies; (vi) the site utilities and utility connections; and (vii) conditions related to transportation, handling, storage and disposal of materials. Contractor further acknowledges that it has fully satisfied itself as to the nature, character, and quality of surface and subsurface conditions to the extent such information is reasonably ascertainable from an inspection of the site, from information available from the local municipality and other public bodies, and from the Contract Documents. The Contractor shall promptly report to the Owner any discovered conditions, defects, damage, or other materially adverse condition(s) discovered by, or otherwise revealed to the Contractor at the Site. The Owner shall not be required to make any adjustments in either the Contract Sum or the Contract Time in connection with any failure by the Contractor to have complied with the requirements of this Section.

§ 3.2.2 Because the Contract Documents are complementary, the Contractor shall, before starting each portion of the Work, carefully study and compare the various Contract Documents relative to that portion of the Work, as well as the information furnished by the Owner pursuant to Section 2.3.4, shall take field measurements of any existing conditions related to that portion of the Work, and shall observe any conditions at the site affecting it. If, during the progress of the Work, the Contractor discovers any error, inconsistency or omission in the Contract Documents or existing conditions or defects at the Site or in the Work, the Contractor shall immediately report such matter to the Architect and the Owner and shall halt all affected Work until such discrepancies have been corrected in accordance with requirements of Article 7. Additions to the Contract Sum or Contract Time shall not be allowed for correction of problems that could have been avoided by careful review of the Contract Documents and/or existing on ongoing conditions by the Contractor, and/or minor adjusting of size or locations of various items for proper fit or as set forth in Section 3.7.4 regarding concealed or unknown conditions. It is recognized that the Contractor's review is made in the Contractor's capacity as a contractor and not as a licensed design professional, unless otherwise specifically provided in the Contract Documents.

§ 3.2.3 The Contractor is not required to ascertain that the Contract Documents are in accordance with applicable laws, statutes, ordinances, codes, rules and regulations, lawful orders, or all other requirements of public authorities now in force or that may be enacted hereafter applicable to the performance of the Work (collectively, the "Applicable Requirements"), unless such Applicable Requirements bear on the performance of the Work. The Contractor shall promptly report to the Architect and the Owner any nonconformity discovered by or made known to the Contractor as a request for information in such form as the Architect may require. It is recognized that the Contractor's review is made in the Contractor's capacity as a contractor and not as a licensed design professional unless otherwise specifically provided in the Contract Documents.

§ 3.2.4 If the Contractor believes that additional cost or time is involved because of clarifications or instructions the Architect issues in response to the Contractor's notices or requests for information pursuant to Sections 3.2.2 or 3.2.3, the Contractor shall submit a request for a change order in accordance with Article 7. If the Contractor fails to perform the obligations of Sections 3.2.2 or 3.2.3, the Owner shall not be required to make any adjustments to the Contract Time or Contract Sum, and the Contractor shall assume full responsibility for any such costs and damages to the Owner (including but not limited to damages relating to delays), as would have been avoided if the Contractor had performed such obligations. If the Contractor performs those obligations, the Contractor shall not be liable to the Owner or Architect for damages resulting from errors, inconsistencies or omissions in the Contract Documents or, for differences between field measurements or conditions and the Contract Documents, or for nonconformities of the Contract Documents to Applicable Requirements, unless the Contractor recognized such error, inconsistency, omission or difference and failed to report it to the Architect and the Owner..

### § 3.3 Supervision and Construction Procedures

§ 3.3.1 The Contractor shall supervise and direct the Work, including the work of all Subcontractors, using the Contractor's best skill and attention. The Contractor shall employ a competent superintendent and necessary assistants who shall be in attendance at the Project site during performance of the Work. Contractor shall not replace the superintendent without the Owner's approval of the replacement. The Contractor shall coordinate the work of all Subcontractors to allow for the efficient progress of the Work. The Contractor shall be solely responsible for, and have control over, construction means, methods, techniques, sequences, and procedures, and for coordinating all portions of the Work under the Contract. If the Contract Documents give specific instructions concerning construction means, methods, techniques, sequences, or procedures, the Contractor shall evaluate the jobsite safety thereof and shall be solely responsible for the jobsite safety of such means, methods, techniques, sequences, or procedures. If the Contractor determines that such means, methods, techniques, sequences or procedures may not be safe, the Contractor shall give timely notice to the Owner and Architect, and shall propose alternative means, methods, techniques, sequences, or procedures and shall not proceed with that portion of the Work without further written instructions from the Architect and Owner. The Architect and Owner shall evaluate the proposed alternative solely for conformance with the design intent for the completed construction. Unless the Architect or the Owner objects to the Contractor's proposed alternative based on design intent, the Contractor shall perform the Work using its proposed alternative means, methods, techniques, sequences, or procedures.

§ 3.3.2 The Contractor shall be responsible to the Owner for acts and omissions of the Contractor's employees, Subcontractors and their agents and employees, and other persons or entities performing portions of the Work for, or on behalf of, the Contractor or any of its Subcontractors and for any damages, losses, costs, expenses, including, but not limited to, reasonable attorneys' fees resulting from such acts or omissions.

§ 3.3.3 The Contractor shall be responsible for inspection of portions of Work already performed to determine that such portions are in proper condition to receive subsequent Work. The Contractor shall repair damage to utility lines, utility cables and water, sewer, or other utility pipes and damage to public improvements, including, but not limited to, sidewalks, caused by the Contractor or any Subcontractor during the performance of the Work.

### § 3.4 Labor and Materials

§ 3.4.1 Unless otherwise provided in the Contract Documents, the Contractor shall provide and pay for labor, materials, equipment, tools, construction equipment and machinery, water, heat, utilities, transportation, and other facilities and services necessary for proper execution and completion of the Work, whether temporary or permanent and whether or not incorporated or to be incorporated in the Work.

§ 3.4.2 Except in the case of minor changes in the Work approved by the Architect in accordance with Section 3.12.8 or ordered by the Architect in accordance with Section 7.4, the Contractor may make substitutions only with the written consent of the Owner, after evaluation by the Architect and in accordance with a Change Order or Construction Change Directive.

§ 3.4.3 The Contractor shall enforce strict discipline and good order among the Contractor's employees and other persons carrying out the Work. The Contractor shall not permit employment of unfit persons or persons not properly skilled in tasks assigned to them.

**§ 3.4.4** The Contractor shall only employ or use labor in connection with the Work capable of working harmoniously with all trades, crafts, and any other individuals associated with the Project. The Contractor shall also use best efforts to minimize the likelihood of any strike, work stoppage, or other labor disturbance.

- .1 If the Work is to be performed by trade unions, the Contractor shall make all necessary arrangements to reconcile, without delay, damage, or cost to the Owner and without recourse to the Owner, any conflict between the Contract Documents and any agreements or regulations of any kind at any time in the force among members or councils that regulate or distinguish the activities that shall not be included in the work of any particular trade.

.2 **In case the progress of the Work is affected by any undue delay in furnishing or installing any items or materials or equipment required under the Contract Documents because of such conflict involving any such labor agreement or regulation, the Owner may require that other material or equipment of equal kind and quality be provided pursuant to a Change Order or Construction Change Directive.**

### **§ 3.5 Warranty**

**§ 3.5.1** The Contractor warrants to the Owner and Architect that materials and equipment furnished under the Contract will be of good quality and new unless the Contract Documents require or permit otherwise. The Contractor further warrants that the Work will conform to the requirements of the Contract Documents and will be free from defects, except for those inherent in the quality of the Work the Contract Documents require or permit. Work, materials, or equipment not conforming to these requirements shall be considered defective. The Contractor's warranty excludes remedy for damage or defect caused by abuse, alterations to the Work not executed by the Contractor, improper or insufficient maintenance, improper operation, or normal wear and tear and normal usage. If required by the Architect or the Owner, the Contractor shall furnish satisfactory evidence as to the kind and quality of materials and equipment. The Contractor's warranty in this Section 3.5.1 is but one of many warranties made by Contractor, whether in the Contract Documents or otherwise, and does not in any way limit Contractor's other obligations relating to the Contract Documents and/or arising under law. In the event that any warranties set forth in the Specifications exceed the warranties set forth in this Section in scope or in time, the more extensive warranties shall control.

**§ 3.5.2** All material, equipment, or other special warranties required by the Contract Documents shall be issued in the name of the Owner, or shall be transferable to the Owner, and shall commence in accordance with Section 9.8.4. Contractor agrees to perform the Work in such manner so as to preserve any and all such warranties.

### **§ 3.6 Taxes**

The Contractor shall pay sales, consumer, use and similar taxes for the Work provided by the Contractor that are legally enacted when bids are received or negotiations concluded, whether or not yet effective or merely scheduled to go into effect.

### **§ 3.7 Permits, Fees, Notices and Compliance with Laws**

**§ 3.7.1** Unless otherwise provided in the Contract Documents, the Contractor shall secure and pay for the building permit as a Cost of the Work, as well as for other permits, fees, licenses, and inspections by government agencies necessary for proper execution and completion of the Work that are customarily secured after execution of the Contract and legally required at the time bids are received or negotiations concluded. All connection charges, assessments, or inspection fees as may be imposed by any municipal agency or utility company shall be the Owner's responsibility.

**§ 3.7.2** The Contractor shall comply with and give notices required by the Applicable Requirements and shall cause all Work to be performed in compliance with the Applicable Requirements. The Contractor shall procure and obtain all bonds required of the Owner or the Contractor by the municipality in which the Project is located or any other public or private body with jurisdiction over the Project. In connection with such bonds, the Contractor shall prepare all applications, supply all necessary backup material, and furnish the surety with any required personal undertakings. The Contractor shall also obtain and pay all charges for all approvals for street closings, parking meter approval, and other similar matters as may be necessary or appropriate from time to time for the performance of the Work.

**§ 3.7.3** If the Contractor performs Work that is contrary to the Applicable Requirements, or lawful orders of public authorities, the Contractor shall assume appropriate responsibility for such Work and shall bear the costs attributable to correction.

#### § 3.7.4 Concealed or Unknown Conditions

If the Contractor encounters conditions at the site that are (1) subsurface or otherwise concealed physical conditions that differ materially from those indicated in the Contract Documents or (2) unknown physical conditions of an unusual nature that differ materially from those ordinarily found to exist and generally recognized as inherent in construction activities of the character provided for in the Contract Documents, then the Contractor shall promptly provide notice to the Owner and the Architect before conditions are disturbed and in no event later than 7 days after first observance of the conditions. The Architect will promptly investigate such conditions and, if the Architect determines that they differ materially and cause an increase or decrease in the Contractor's cost of, or time required for, performance of any part of the Work, will recommend that an equitable adjustment be made in the Contract Sum or Contract Time, or both. If the Architect determines that the conditions at the site are not materially different from those indicated in the Contract Documents and that no change in the terms of the Contract is justified, the Architect shall promptly notify the Owner and Contractor in writing, stating the reasons. If either party disputes the Architect's determination or recommendation, that party may submit a Claim as provided in Article 15. Any Claim for an increase in Contract Time or Contract Sum based on, or challenging the decision of the Architect shall be resolved pursuant to the Change Order procedure set forth in Article 7. No adjustment in the Contract Time or Contract Sum shall be permitted, however, in connection with any concealed or unknown condition that does not differ materially from those conditions disclosed or that reasonably should have been disclosed by the Contractor's (1) prior inspections, tests, reviews, and preconstruction services for the Project, or (2) inspections, tests, reviews, and preconstruction services that the Contractor had the opportunity to make or should have performed in connection with the Project.

§ 3.7.5 If, in the course of the Work, the Contractor encounters human remains or recognizes the existence of burial markers, archaeological sites or wetlands not indicated in the Contract Documents, the Contractor shall immediately suspend any operations that would affect them and shall notify the Owner and Architect. Upon receipt of such notice, the Owner shall promptly take any action necessary to obtain governmental authorization required to resume the operations. The Contractor shall continue to suspend such operations until otherwise instructed by the Owner but shall continue with all other operations that do not affect those remains or features. Requests for adjustments in the Contract Sum and Contract Time arising from the existence of such remains or features may be made as provided in Article 15.

#### § 3.8 Allowances

§ 3.8.1 The Contractor shall include in the Contract Sum all allowances stated in the Contract Documents. Items covered by allowances shall be supplied for such amounts and by such persons or entities as the Owner may direct, but the Contractor shall not be required to employ persons or entities to whom the Contractor has reasonable objection.

§ 3.8.2 Unless otherwise provided in the Contract Documents,

- .1 allowances shall cover the cost to the Contractor of materials and equipment delivered at the site and all required taxes, less applicable trade discounts;
- .2 Contractor's costs for unloading and handling at the site, labor, installation costs, overhead, profit, and other expenses contemplated for stated allowance amounts shall be included in the Contract Sum but not in the allowances; and
- .3 whenever costs are more than or less than allowances, the Contract Sum shall be adjusted accordingly by Change Order. The amount of the Change Order shall reflect (1) the difference between actual costs and the allowances under Section 3.8.2.1 and (2) changes in Contractor's costs under Section 3.8.2.2.

§ 3.8.3 Materials and equipment under an allowance shall be selected by the Owner with reasonable promptness.

#### § 3.9 Superintendent

§ 3.9.1 The Contractor shall employ a competent superintendent and necessary assistants who shall be in attendance at the Project site during performance of the Work, including the work of all Subcontractors. The superintendent shall represent the Contractor, and communications given to the superintendent shall be as binding as if given to the Contractor.

§ 3.9.2 The Contractor, as soon as practicable after award of the Contract, shall notify the Owner and Architect of the name and qualifications of a proposed superintendent. Within 14 days of receipt of the information, the Owner may notify the Contractor, stating whether the Owner (1) has reasonable objection to the proposed superintendent or (2) requires additional time for review. Failure of the Owner to provide notice within the 14-day period shall constitute notice of no reasonable objection.

§ 3.9.3 The Contractor shall not employ a proposed superintendent to whom the Owner or Architect has made reasonable and timely objection. The Contractor shall not change the superintendent without the Owner's prior written consent, which shall not unreasonably be withheld or delayed.

### § 3.10 Contractor's Construction and Submittal Schedules

§ 3.10.1 The Construction Schedule is attached to the Agreement as an Exhibit. The schedule shall contain detail appropriate for the Project, including (1) the date of commencement of the Work, interim schedule milestone dates, and the date of Substantial Completion; (2) an apportionment of the Work by construction activity; (3) the time required for completion of each portion of the Work and show the critical path; (4) show areas of the Site affected by that Work per phase of the Work; (5) show coordination with any other contractors working on the Site; and (6) show coordination with Owner's schedule for relocating tenants from the Site and moving tenants back on to the Site to the extent applicable. The Contractor shall incorporate into the Schedule, time sufficient to address weather days resulting from reasonably anticipated weather conditions for the period during which the Work is to be performed and shall indicate the number of "weather days". The term "weather day" means any regular scheduled work day during which the Contractor is unable make progress in completion of the Work due to inclement weather. The Contractor shall submit documentation substantiating any claimed weather dates which each application for payment including documentation showing that the delay impacts the critical path such that use of the weather day is necessary to allow Substantial Completion to occur within the established Contract Time.

The schedule shall provide for the orderly progression of the Work to completion and shall not exceed time limits current under the Contract Documents. Subject to the approval of the Owner, the schedule shall be revised at appropriate intervals as required by the conditions of the Work and Project. Following the Owner's approval of such revisions to the Schedule, if any, such revisions shall be attached to and incorporated into the Schedule provided, however, an extension to the Contract Time shall only be effective pursuant to a Change Order in accordance with Article 7.

§ 3.10.2 The Contractor, promptly after being awarded the Contract and thereafter as necessary to maintain a current submittal schedule, shall submit a submittal schedule for the Architect's approval. The Architect's approval shall not be unreasonably delayed or withheld. The submittal schedule shall (1) be coordinated with the Schedule, as amended in accordance with Section 3.10.1, and (2) allow the Architect reasonable time to review submittals. If the Contractor fails to submit a submittal schedule, or fails to provide submittals in accordance with the approved submittal schedule, the Contractor shall not be entitled to any increase in Contract Sum or extension of Contract Time based on the time required for review of submittals.

§ 3.10.3 The Contractor shall perform the Work in strict accordance with the Schedule as may be amended pursuant to Section 3.10.1, and shall expedite the Work if construction falls behind the dates and times set forth in the Schedule and shall provide a recovery Schedule if requested by Owner. The Contractor shall have the sole and exclusive responsibility for completing the Work according to the Schedule. Any proposed revisions to the Schedule shall be submitted by the Contractor pursuant to the Change Order procedure set forth in Article 7. If the Owner determines that the performance of the Work has not reached the level of completion set forth in the Schedule or the Contract Documents, the Owner shall have the right to require the Contractor to take all measures necessary to expedite the Work including but not limited to working additional shifts or overtime, supplying additional labor, equipment, facilities, and other similar measures. Such measures shall continue until the progress of the Work complies with the stage of completion required by the Contract Documents. The Owner's right to require such measures is solely for the purpose of ensuring Contractor compliance with the Schedule. The Contractor shall not be entitled to an adjustment in Contract Sum in connection with such measures required by the Owner. The Owner may exercise the rights furnished in this Section as frequently as Owner deems necessary to ensure that the Contractor's performance of the Work will comply with the Contract Time.=

### § 3.11 Documents and Samples at the Site

The Contractor shall make available, at the Project site, the Contract Documents, including Change Orders, Construction Change Directives, and other Modifications, in good order and marked currently to indicate field changes and selections made during construction, and the approved Shop Drawings, Product Data, Samples, and similar required submittals. These shall be in electronic form or paper copy, available to the Architect and Owner, and delivered to the Owner upon completion of the Work as a record of the Work as constructed.

### § 3.12 Shop Drawings, Product Data and Samples

§ 3.12.1 Shop Drawings are drawings, diagrams, schedules, and other data specially prepared for the Work by the Contractor or a Subcontractor, Sub-subcontractor, manufacturer, supplier, or distributor to illustrate some portion of the Work.

§ 3.12.2 Product Data are illustrations, standard schedules, performance charts, instructions, brochures, diagrams, and other information furnished by the Contractor to illustrate materials or equipment for some portion of the Work.

§ 3.12.3 Samples are physical examples that illustrate materials, equipment, or workmanship, and establish standards by which the Work will be judged.

§ 3.12.4 Shop Drawings, Product Data, Samples, and similar submittals are not Contract Documents. Their purpose is to demonstrate how the Contractor proposes to conform to the information given and the design concept expressed in the Contract Documents for those portions of the Work for which the Contract Documents require submittals. Review by the Architect is subject to the limitations of Section 4.2.7. Informational submittals upon which the Architect is not expected to take responsive action may be so identified in the Contract Documents. Submittals that are not required by the Contract Documents may be returned by the Architect without action.

§ 3.12.5 The Contractor shall review for compliance with the Contract Documents, approve, and submit to the Architect, Shop Drawings, Product Data, Samples, and similar submittals required by the Contract Documents, in accordance with the submittal schedule approved by the Architect or, in the absence of an approved submittal schedule, with reasonable promptness and in such sequence as to cause no delay in the Work or in the activities of the Owner or of Separate Contractors.

§ 3.12.6 By submitting Shop Drawings, Product Data, Samples, and similar submittals, the Contractor represents to the Owner and Architect that the Contractor has (1) reviewed and approved them, (2) determined and verified materials, field measurements and field construction criteria related thereto, or will do so, and (3) checked and coordinated the information contained within such submittals with the requirements of the Work and of the Contract Documents.

§ 3.12.7 The Contractor shall perform no portion of the Work for which the Contract Documents require submittal and review of Shop Drawings, Product Data, Samples, or similar submittals, until the respective submittal has been approved by the Architect and Owner.

§ 3.12.8 The Work shall be in accordance with approved submittals except that the Contractor shall not be relieved of responsibility for deviations from the requirements of the Contract Documents by the Architect's approval of Shop Drawings, Product Data, Samples, or similar submittals, unless the Contractor has specifically notified the Architect in writing of such deviation at the time of submittal and (1) the Architect has given written approval to the specific deviation as a minor change in the Work, or (2) a Change Order or Construction Change Directive has been issued authorizing the deviation. The Contractor shall not be relieved of responsibility for errors or omissions in Shop Drawings, Product Data, Samples, or similar submittals, by the Architect's approval thereof.

§ 3.12.9 The Contractor shall direct specific attention, in writing or on resubmitted Shop Drawings, Product Data, Samples, or similar submittals, to revisions other than those requested by the Architect on previous submittals. In the absence of such written notice, the Architect's approval of a resubmission shall not apply to such revisions.

§ 3.12.10 The Contractor shall not be required to provide professional services that constitute the practice of architecture or engineering unless such services are specifically required by the Contract Documents for a portion of the Work or unless the Contractor needs to provide such services in order to carry out the Contractor's responsibilities for construction means, methods, techniques, sequences, and procedures (such services to be provided by the Contractor are collectively referred to herein as the "Design-Build Work"). The components of the Work comprising the "Design Build Work" may be more particularly described in an Exhibit to the Agreement. The Contractor shall not be required to provide professional services in violation of applicable law.

§ 3.12.10.1 In connection with the Design-Build Work, or if professional design services or certifications by a design professional related to systems, materials, or equipment are specifically required of the Contractor by the Contract Documents, the Contractor shall cause such services or certifications to be provided by an appropriately licensed design professional, pursuant to an agreement between the Contractor and such design professional meeting the



requirements of Section 5.3. Such design professional shall be reasonably acceptable to the Owner and such design professional's signature and seal shall appear on all drawings, calculations, specifications, certifications, Shop Drawings, and other submittals prepared by such professional. Shop Drawings, and other submittals related to the Work, designed or certified by such professional, if prepared by others, shall bear such professional's written approval when submitted to the Architect and shall comply with all Applicable Requirements. The Owner and the Architect shall be entitled to rely upon the adequacy and accuracy of the services, certifications, and approvals performed or provided by such design professionals.

**§ 3.12.10.2** If the Contract Documents require the Contractor's design professional to certify that the Work has been performed in accordance with the design criteria, the Contractor shall furnish such certifications to the Architect at the time and in the form specified by the Architect.

### **§ 3.13 Use of Site**

The Contractor shall confine operations at the site to areas permitted by the Applicable Requirements, lawful orders of public authorities, and the Contract Documents and shall not unreasonably encumber the site with materials or equipment. The Contractor shall ensure that the Work, at all times, is performed in a manner that affords reasonable and safe access, both vehicular and pedestrian, to the site of the Work, including, but not limited to as applicable, all portions of the site utilized by Owner's tenants or other users, and all adjacent areas including necessary emergency ingress and egress. The Work shall be performed, to the fullest extent reasonably possible, in such manner that public areas adjacent to the site of the Work shall be free from all debris, building materials, and equipment likely to cause hazardous conditions. Only materials and equipment that are to be used directly in the Work shall be brought to and stored on the site by the Contractor. After equipment is no longer required for the Work, it shall be promptly removed from the site. Protection of construction materials and equipment stored at the Project site from weather, theft, damage, and all other adversity is solely the responsibility of the Contractor.

**§ 3.13.1** The Contractor acknowledges that Owner's tenants shall be occupying the Project while the Contractor is performing the Work. The Contractor shall take all reasonable precautions to ensure that the Work is performed in such a manner so as not to endanger, threaten, or impair the safety of tenants or their guests and invitees to the Project, and shall construct and maintain reasonable safeguards as required by the condition and progress of the Work. Contractor shall take all reasonably available efforts to eliminate unnecessary noise, dust, or obstructions during the performance of the Work. Contractor shall ensure that all Subcontractors are aware that the Project will be occupied by Owner's tenants during the performance of the Work and shall require in all subcontracts that Subcontractors take necessary safety precautions when performing work on the Project including proper handling, treating and disposing of any potentially hazardous materials found on the Project.

**§ 3.13.2** The Contractor shall take care to protect the premises surrounding the work areas, including but not limited to, existing utilities, equipment, vegetation, interior flooring and walls to the extent impacted by the performance of the Work and shall utilize protective coverings as appropriate. Contractor shall be responsible for repairing any damage to vegetation, structures, equipment, utilities, or improvements, including those that are the property of a third party (including, but not limited to, any tenant of Owner if applicable), resulting from the failure to comply with the requirements of this Contract or failure to exercise reasonable care in performing the Work. If the Contractor fails or refuses to repair the damage promptly, the Owner may have the necessary work performed and charge the cost to the Contractor.

**§ 3.13.3** In order to minimize any disruption or interference with the Owner's tenants use of the Project, the Contractor shall comply with, and shall cause all Subcontractors and all persons under each of their control or supervision to comply with, each of the following requirements:

**.1** Vehicles access shall only be along public and private roads, and any parked vehicles shall not obstruct the parking areas of Owner's tenants, and any guest parking areas. Prior to the commencement of the Work, the Contractor and the Owner shall determine: (i) the parking area(s) for Contractor's and Subcontractor's vehicular parking; and (ii) areas for storage of supplies and materials (if any). Thereafter, Contractor, Subcontractors and each of their employees and agents shall only park and store supplies and materials in such designated areas;

**.2** In the event entry into a residential unit occupied by a tenant is necessary in connection with the performance of the Work, then the Contractor shall notify the Owner, and no entry into such unit shall be permitted until the Owner has provided notice to the tenant in accordance with the tenant's lease, and the

Owner has notified the Contractor of the specific date and time such entry is permitted. In such event the Contractor shall use commercially reasonable efforts to minimize the time period that Work is performed within the residential unit, and, in addition to the requirements set forth in Section 3.15, below, upon completion of the portion of the Work within the residential unit, the Contractor shall cause such residential unit to be restored to the condition that existed immediately prior to entry by the Contractor, Subcontractor, or either of their employees or agents (other than the Work);

.3 If Contractor is responsible for providing temporary toilet facilities under the Contract Documents, then the Contractor, Subcontractors, and each of their employees and agents shall only use such facilities provided by the Contractor. If the Contractor is not responsible for providing temporary toilet facilities under the Contract Documents, then, prior to the commencement of the Work, the Owner shall designate public restrooms within the Project to be made available to the Contractor, the Subcontractors, and each of their employees. In no event shall Contractor, Subcontractor(s), or any of their employees or agents use any restroom within an occupied residential unit;

.4 In the event that the performance of the Work requires existing utilities (including, but not limited to, water, heat, electricity, or telecommunications) to be shut-off, then the Contractor shall not cause such utilities to be shut off until: (i) Contractor has notified Owner of such requirement, and (ii) Owner has notified the Owner's tenants of such requirement in accordance with the residents' leases. In such event the Contractor shall use commercially reasonable efforts to minimize the time period that any utility serving the Project is shut-off.

### § 3.14 Cutting and Patching

§ 3.14.1 The Contractor shall be responsible for cutting, fitting, or patching required to complete the Work or to make its parts fit together properly. New work which connects to existing work shall correspond in all respects with that to which it connects; provided, however, such new work shall be in compliance with the Contract Documents. All areas requiring cutting, fitting, or patching shall be restored to the condition existing prior to the cutting, fitting, or patching, unless otherwise required by the Contract Documents.

§ 3.14.2 The Contractor shall not damage or endanger a portion of the Work or fully or partially completed construction of the Owner or Separate Contractors by cutting, patching, or otherwise altering such construction, or by excavation. The Contractor shall not cut or otherwise alter construction by the Owner or a Separate Contractor except with written consent of the Owner and of the Separate Contractor. Consent shall not be unreasonably withheld. The Contractor shall not unreasonably withhold, from the Owner or a Separate Contractor, its consent to cutting or otherwise altering the Work.

### § 3.15 Cleaning Up

§ 3.15.1 The Contractor shall keep the premises and surrounding area free from accumulation of waste materials and rubbish caused by operations under the Contract. Special consideration shall be given to any materials posing a hazard to the residents of the Project. At completion of the Work, the Contractor shall remove waste materials, rubbish, the Contractor's tools, construction equipment, machinery, and surplus materials from and about the Project. If applicable, the Contractor shall clean all glass, replace all broken glass, remove stains, spots, dust and dust from finished surfaces; clean all hardware; remove extraneous paint and smears from surfaces; clean all fixtures and wash all concrete, but only to the extent the need for such work was caused by Contractor.

§ 3.15.2 If the Contractor fails to clean up as provided in the Contract Documents, the Owner may do so and the Owner shall be entitled to reimbursement from the Contractor, pursuant to a deductive Change Order, or otherwise.

### § 3.16 Access to Work

The Contractor shall provide the Owner and Architect with access to the Work in preparation and progress wherever located.

### § 3.17 Royalties, Patents and Copyrights

The Contractor shall pay all royalties and license fees. The Contractor shall defend suits or claims for infringement of copyrights and patent rights and shall hold the Owner and Architect harmless from loss on account thereof, but shall not be responsible for defense or loss when a particular design, process, or product of a particular manufacturer or manufacturers is required by the Contract Documents, or where the copyright violations are contained in Drawings,

Specifications, or other documents prepared by the Owner or Architect. However, if an infringement of a copyright or patent is discovered by, or made known to, the Contractor, the Contractor shall be responsible for the loss unless the information is promptly furnished to the Architect.

### **§ 3.18 Indemnification**

**§ 3.18.1** To the fullest extent permitted by law, the Contractor shall indemnify, defend, and hold harmless the Owner (and its officers, directors, affiliates, and partners or members), Architect, Architect's consultants, and agents and employees of any of them, and Lenders to the Project from and against claims, damages, losses, and expenses, including but not limited to attorneys' fees, arising out of or resulting from performance of the Work, but only to the extent caused by the negligent acts or omissions of the Contractor, a Subcontractor, anyone directly or indirectly employed by them, or anyone for whose acts they may be liable, regardless of whether or not such claim, damage, loss, or expense is caused in part by a party indemnified hereunder. Such obligation shall not be construed to negate, abridge, or reduce other rights or obligations of indemnity that would otherwise exist as to a party or person described in this Section 3.18.

The Contractor's indemnity obligations under this Paragraph 3.18 shall also specifically include, to the extent caused by the negligent acts or omissions of the Contractor, without limitation, all fines, penalties, damages, liability, costs, expenses (including, without limitation, reasonable attorney's fees), and punitive damages (if any) arising out of or in connection with, any (i) violation of or failure to comply with any Applicable Requirements that bears upon the performance of the Work by the Contractor, a Subcontractor, or any person or entity from whom either is responsible, (ii) means, methods, procedures, techniques, or sequences of execution or performance of the Work, and (iii) failure to secure and pay for permits, fees, approvals, licenses, and inspections as required under the Contract Documents, or any violation of any permit or other approval of a public authority applicable to the Work, by the Contractor, a Subcontractor, or any person or entity for whom either is responsible.

**§ 3.18.2** In claims against any person or entity indemnified under this Section 3.18 by an employee of the Contractor, a Subcontractor, anyone directly or indirectly employed by them, or anyone for whose acts they may be liable, the indemnification obligation under Section 3.18.1 shall not be limited by a limitation on amount or type of damages, compensation, or benefits payable by or for the Contractor or a Subcontractor under workers' compensation acts, disability benefit acts, or other employee benefit acts.

**§ 3.18.3** The Contractor shall defend the Owner and the Owner's affiliates, employees, and successors in any and all actions brought by Subcontractors or material suppliers against the Owner to foreclose a mechanic's lien on the real property of the Work, to enforce any stop notice against the Work or for common counts or any other claim arising out of the Work, except if such actions or claims are caused solely by the Owner's failure to pay the Contractor in breach of its obligation under the terms of this Contract. The Contractor shall indemnify the Owner and its affiliates and employees, and successors with respect to such actions or claims, including, but not limited to, reasonable attorneys' fees, and for amounts paid by the Owner in good faith settlement of mechanic's lien foreclosure, stop notice and common counts actions against the real property of the Work.

**§ 3.18.4** The Contractor shall indemnify and hold harmless all of the persons or entities to be indemnified pursuant to Paragraph 3.18 from and against any costs and expenses (including reasonable attorney's fees) incurred by any of the indemnitees in enforcing any of the Contractor's defense, indemnity and hold harmless obligations under this Contract.

**§ 3.18.5** This Section 3.18 shall survive the termination or expiration of this Contract.

## **ARTICLE 4 ARCHITECT**

### **§ 4.1 General**

**§ 4.1.1** The Architect is the person or entity retained by the Owner pursuant to Section 2.3.2 and identified as such in the Agreement.

**§ 4.1.2** Duties, responsibilities, and limitations of authority of the Architect as set forth in the Contract Documents shall not be restricted, modified, or extended without written consent of the Owner, Contractor, and Architect. Consent shall not be unreasonably withheld. To the extent of a conflict between the provisions pertaining to the Architect set forth in this Contract and the Agreement between the Architect and Owner (the "Architect Agreement"), the Architect Agreement shall control.

## § 4.2 Administration of the Contract

§ 4.2.1 The Architect will provide administration of the Contract as described in the Contract Documents and will be an Owner's representative during construction until the later of: (i) the date the Architect issues the final Certificate for Payment or (ii) the expiration of the one-year period for the correction of Work, as applicable, as set forth in the Architect Agreement. The Architect will have authority to act on behalf of the Owner only to the extent provided in the Contract Documents.

§ 4.2.2 The Architect will visit the site as set forth in the Architect Agreement. The Architect will not have control over, charge of, or responsibility for the construction means, methods, techniques, sequences or procedures, or for the safety precautions and programs in connection with the Work, since these are solely the Contractor's rights and responsibilities under the Contract Documents.

§ 4.2.3 On the basis of the site visits, the Architect will keep the Owner reasonably informed about the progress and quality of the portion of the Work completed, and promptly report to the Owner (1) known deviations from the Contract Documents, (2) known deviations from the most recent construction schedule submitted by the Contractor, and (3) defects and deficiencies observed in the Work. The Architect will not be responsible for the Contractor's failure to perform the Work in accordance with the requirements of the Contract Documents. The Architect will not have control over or charge of, and will not be responsible for acts or omissions of, the Contractor, Subcontractors, or their agents or employees, or any other persons or entities performing portions of the Work.

## § 4.2.4 Communications

The Owner and Contractor shall include the Architect in all communications that relate to or affect the Architect's services or professional responsibilities. Communications by and with the Architect's consultants shall be through the Architect. Communications by and with Subcontractors and suppliers shall be through the Contractor. Communications by and with Separate Contractors shall be through the Owner. The Contract Documents may specify other communication protocols.

§ 4.2.5 Based on the Architect's evaluations of the Work and Contractor's Applications for Payment, the Architect will review the Contractor's draft Certificates for Payment and make recommendations to the Owner regarding amounts due to the Contractor.

§ 4.2.6 The Architect, subject to the consent of the Owner, has authority to reject Work that does not conform to the Contract Documents. Whenever the Architect considers it necessary or advisable, the Architect, with the consent of the Owner will have authority to require inspection or testing of the Work in accordance with Sections 13.4.2 and 13.4.3, whether or not the Work is fabricated, installed or completed.

§ 4.2.7 The Architect will review and approve, or take other appropriate action upon, the Contractor's submittals such as Shop Drawings, Product Data, and Samples, but only for the limited purpose of checking for conformance with information given and the design concept expressed in the Contract Documents. The Architect's action will be taken in accordance with the submittal schedule approved by the Architect or, in the absence of an approved submittal schedule, with reasonable promptness while allowing sufficient time in the Architect's professional judgment to permit adequate review. Review of such submittals is not conducted for the purpose of determining the accuracy and completeness of other details such as dimensions and quantities, or for substantiating instructions for installation or performance of equipment or systems, all of which remain the responsibility of the Contractor as required by the Contract Documents. The Architect's review of the Contractor's submittals shall not relieve the Contractor of the obligations under Sections 3.3, 3.5, and 3.12. The Architect's review shall not constitute approval of safety precautions or of any construction means, methods, techniques, sequences, or procedures. The Architect's approval of a specific item shall not indicate approval of an assembly of which the item is a component. The Contractor shall pay for the cost of the Architect's review if the review indicates that the Contractor's submittal is repeatedly not in conformance with the Contract Documents.

§ 4.2.8 The Architect will prepare Change Orders (based on Contractor's preliminary Change Order Requests) and Construction Change Directives, and may order minor changes in the Work as provided in Section 7.4. The Architect will investigate and make determinations and recommendations regarding concealed and unknown conditions as provided in Section 3.7.4.

§ 4.2.9 The Architect will conduct inspections to determine the date or dates of Substantial Completion and the date of final completion; issue Certificates of Substantial Completion pursuant to Section 9.8; receive and forward to the

Owner, for the Owner's review and records, written warranties and related documents required by the Contract and assembled by the Contractor pursuant to Section 9.10; and will, subject to the Owner's review, approve a final Certificate for Payment pursuant to Section 9.10.

§ 4.2.10 If the Owner and Architect agree, the Architect will provide one or more Project representatives to assist in carrying out the Architect's responsibilities at the site. The Owner shall notify the Contractor of any change in the duties, responsibilities and limitations of authority of the Project representatives.

§ 4.2.11 The Architect will interpret and make recommendations on matters concerning performance under, and requirements of, the Contract Documents on written request of either the Owner or Contractor. The Architect's response to such requests will be made in writing within any time limits agreed upon or otherwise with reasonable promptness.

§ 4.2.12 Interpretations and recommendations of the Architect will be consistent with the intent of, and reasonably inferable from, the Contract Documents and will be in writing or in the form of drawings.

§ 4.2.13 The Architect's decisions on matters relating to aesthetic effect, in connection with administration of the Contract will be final if consistent with the intent expressed in the Contract Documents.

§ 4.2.14 The Architect will review and respond to requests for information about the Contract Documents. The Architect's response to such requests will be made in writing within any time limits agreed upon or otherwise with reasonable promptness. If appropriate, the Architect will prepare and issue supplemental Drawings and Specifications in response to the requests for information.

## ARTICLE 5 SUBCONTRACTORS

### § 5.1 Definitions

§ 5.1.1 A Subcontractor is a person or entity who has a direct contract with the Contractor to perform a portion of the Work at the site, including, but not limited to, any entity described in Section 3.12.10.. The term "Subcontractor" is referred to throughout the Contract Documents as if singular in number and means a Subcontractor or an authorized representative of the Subcontractor. The term "Subcontractor" does not include a Separate Contractor or the subcontractors of a Separate Contractor.

§ 5.1.2 A Sub-subcontractor is a person or entity who has a direct or indirect contract with a Subcontractor to perform a portion of the Work at the site. The term "Sub-subcontractor" is referred to throughout the Contract Documents as if singular in number and means a Sub-subcontractor or an authorized representative of the Sub-subcontractor.

§ 5.1.3 Any specific requirement in the Contract that the responsibilities or obligations of the Contractor also apply to a Subcontractor is added for emphasis and is also hereby deemed to include a Subcontractor of any tier. The omission of a reference to a Subcontractor in connection with any of the Contractor's responsibilities or obligations shall not be construed to diminish, abrogate, or limit any responsibilities or obligations of a subcontractor of any tier under the Contract Documents or the applicable subcontract.

§ 5.1.4 The Contractor shall identify which portions of the Work will be self-performed by the Contractor or by affiliates of the Contractor, or if equipment will be leased from affiliates of the Contractor. The Owner reserves the right to require competitive bidding of any work to be self-performed by Contractor or an affiliate.

### § 5.2 Award of Subcontracts and Other Contracts for Portions of the Work

§ 5.2.1 The Contractor shall select all Subcontractors, and in connection with such selection, if requested by Lenders to the Project or at Owner's request, provide the Owner with a draft copy of its form subcontract, and disclose to the Owner the name, trade, and subcontract amounts for each subcontractor prior to the commencement of the Work. Subcontractors shall have the required licenses and expertise necessary to perform the proposed subcontract work. Unless otherwise stated in the Contract Documents, the Contractor, as soon as practicable after award of the Contract, but in any event prior to entering into a contract with a proposed Subcontractor, shall notify the Owner and Architect of the persons or entities proposed for each principal portion of the Work, including those who are to furnish materials or equipment fabricated to a special design. Within 14 days of receipt of the information, the Architect may notify the Contractor whether the Owner or the Architect (1) has reasonable objection to any such proposed person or entity or (2) requires additional time for review. Failure of the Architect or the Owner to provide notice within the 14-day period shall constitute notice of no reasonable objection. If any contract between the Contractor and a Subcontractor is

materially altered so that it differs from the form subcontract provided to the Owner with regard to terms other than (1) the description of the Work to be performed pursuant to the subcontract, and (2) the subcontract price, that subcontract shall be submitted to Owner for its review prior to the commencement of the Work. The Owner's review of any subcontract shall not limit or otherwise impair Contractor's obligations to require each subcontract to comply with the Contract Documents. Review by the Owner, if any, shall in no way be deemed to be a representation by the Owner that the subcontract complies with the Contract Documents, or the enforceability or business advantage of the subcontract. Contractor shall assure all subcontracts contain the Lender requirements attached as an Exhibit to the Contract.

**§ 5.2.2** The Contractor shall not contract with a proposed person or entity to whom the Owner or Architect has made reasonable and timely objection. The Contractor shall not be required to contract with anyone to whom the Contractor has made reasonable objection.

**§ 5.2.3** If the Owner has reasonable objection to a person or entity proposed by the Contractor, the Contractor shall propose another to whom the Owner has no reasonable objection. If the proposed but rejected Subcontractor was reasonably capable of performing the Work, the Contract Sum and Contract Time shall be increased or decreased by the difference, if any, occasioned by such change, and an appropriate Change Order shall be issued before commencement of the substitute Subcontractor's Work. However, no increase in the Contract Sum or Contract Time shall be allowed for such change unless the Contractor has acted promptly and responsively in submitting names as required.

**§ 5.2.4** The Contractor shall not substitute a Subcontractor, person, or entity for one previously selected if the Owner or Architect makes reasonable objection to such substitution.

### **§ 5.3 Subcontractual Relations**

By appropriate written agreement, the Contractor shall require each Subcontractor, to the extent of the Work to be performed by the Subcontractor, to be bound to the Contractor by terms of the Contract Documents, and to assume toward the Contractor all the obligations and responsibilities, including the responsibility for safety of the Subcontractor's Work that the Contractor, by these Contract Documents, assumes toward the Owner and Architect. Each subcontract agreement shall preserve and protect the rights of the Owner and Architect under the Contract Documents with respect to the Work to be performed by the Subcontractor so that subcontracting thereof will not prejudice such rights, and shall allow to the Subcontractor, unless specifically provided otherwise in the subcontract agreement, the benefit of all rights, remedies, and redress against the Contractor that the Contractor, by the Contract Documents, has against the Owner. Where appropriate, the Contractor shall require each Subcontractor to enter into similar agreements with Sub-subcontractors. The Contractor shall make available to each proposed Subcontractor, prior to the execution of the subcontract agreement, copies of the Contract Documents to which the Subcontractor will be bound, and, upon written request of the Subcontractor, identify to the Subcontractor terms and conditions of the proposed subcontract agreement that may be at variance with the Contract Documents. Subcontractors will similarly make copies of applicable portions of such documents available to their respective proposed Sub-subcontractors. Any part of the Work performed for the Contractor by a Subcontractor shall be pursuant to a written subcontract between the Contractor and such Subcontractor, consistent with the requirements of this Contract. Each subcontract shall, among other matters:

- .1 Require that the Work be performed in accordance with the requirements of the Contract Documents;
- .2 Require the Subcontractor to carry and maintain liability insurance in accordance with the Contract Documents;
- .3 Require the Subcontractor to furnish such certificates and waivers, including waivers of mechanic's lien rights, as the Lender or the Owner may reasonably request;
- .4 Require the Subcontractor to cooperate with the Lender to the Work to the same extent as the Contractor is required to cooperate with the Lender according to the Contract Documents;
- .5 Include the applicable Lender requirements attached as an Exhibit to the Agreement;
- .6 Shall specifically provide that the Owner is an intended third-party beneficiary of such subcontract and that the Subcontractor recognizes the rights of the Owner under Section 5.4 below; and

- .7 Require the Subcontractor to comply with all provisions of this Contract regarding the Owner's tenants to the extent applicable, including, but not limited to, all obligations set forth in Section 3.13.

#### § 5.4 Contingent Assignment of Subcontracts

§ 5.4.1 Each subcontract agreement for a portion of the Work is assigned by the Contractor to the Owner, provided that

- .1 assignment is effective only after termination of the Contract by the Owner for cause pursuant to Section 14.2 and only for those subcontract agreements that the Owner accepts by notifying the Subcontractor and Contractor; and
- .2 assignment is subject to the prior rights of the surety, if any, obligated under bond relating to the Contract.

If the Owner accepts the assignment of a subcontract agreement as set forth above, then, the Owner assumes the Contractor's rights and obligations under the subcontract.

#### § 5.4.2 Intentionally Deleted.

§ 5.4.3 Upon acceptance of such assignment to the Owner under this Section 5.4, the Owner may further assign the subcontract to a successor contractor or other entity. If the Owner assigns the subcontract to a successor contractor or other entity, the Owner shall nevertheless remain legally responsible for all of the successor contractor's obligations under the subcontract, except if Owner obtains a release from the applicable Subcontractor.

§ 5.4.4 Each subcontract shall specifically provide that the Owner shall only be responsible to the Subcontractor for those obligations of the Contractor that accrue subsequent to the Owner's exercise of any rights under this conditional assignment.

### ARTICLE 6 CONSTRUCTION BY OWNER OR BY SEPARATE CONTRACTORS

#### § 6.1 Owner's Right to Perform Construction and to Award Separate Contracts

§ 6.1.1 The term "Separate Contractor(s)" shall mean other contractors retained by the Owner under separate agreements. The Owner reserves the right to perform construction or operations related to the Project with the Owner's own forces, and with Separate Contractors, including portions of the Work which have been deleted by Change Order, retained under Conditions of the Contract substantially similar to those of this Contract.

§ 6.1.2 When separate contracts are awarded for different portions of the Project or other construction or operations on the site, the term "Contractor" in the Contract Documents in each case shall mean the Contractor who executes each separate Owner-Contractor Agreement.

§ 6.1.3 The Owner shall provide for coordination of the activities of the Owner's own forces and of each Separate Contractor with the Work of the Contractor. The Contractor shall do its utmost to cooperate with each separate contractor and shall coordinate its construction schedule with the schedules of the other contractors and the Owner to expedite the timely completion of the Work. The Contractor shall participate with any Separate Contractors and the Owner in reviewing their construction schedules. The Contractor shall make any revisions to its construction schedule deemed necessary after a joint review and mutual agreement. The construction schedules shall then constitute the schedules to be used by the Contractor, Separate Contractors, and the Owner until subsequently revised.

§ 6.1.4 Unless otherwise provided in the Contract Documents, when the Owner performs construction or operations related to the Project with the Owner's own forces or with Separate Contractors, the Owner or its Separate Contractors shall have the same obligations and rights that the Contractor has under this Article 6.

#### § 6.2 Mutual Responsibility

§ 6.2.1 The Contractor shall afford the Owner and Separate Contractors reasonable opportunity for introduction and storage of their materials and equipment and performance of their activities, and shall connect and coordinate the Contractor's construction and operations with theirs as required by the Contract Documents.

§ 6.2.2 If part of the Contractor's Work depends for proper execution or results upon construction or operations by the Owner or a Separate Contractor, the Contractor shall, prior to proceeding with that portion of the Work, promptly notify the Architect of apparent or known discrepancies or defects in the construction or operations by the Owner or Separate Contractor that would render it unsuitable for proper execution and results of the Contractor's Work. Failure of the Contractor to notify the Architect of apparent or known discrepancies or defects prior to proceeding with the

Work shall constitute an acknowledgment that the Owner's or Separate Contractor's completed or partially completed construction is fit and proper to receive the Contractor's Work. The Contractor shall not be responsible for discrepancies or defects in the construction or operations by the Owner or Separate Contractor that are not known or apparent.

§ 6.2.3 The Contractor shall reimburse the Owner for costs the Owner incurs that are payable to a Separate Contractor because of the Contractor's delays, improperly timed activities or defective construction. The Owner shall be responsible to the Contractor for costs the Contractor incurs because of a Separate Contractor's delays, improperly timed activities, damage to the Work or defective construction.

§ 6.2.4 The Contractor shall promptly remedy damage that the Contractor causes to completed or partially completed construction or to property of the Owner or Separate Contractor as provided in Section 10.2.5.

§ 6.2.5 The Owner and each Separate Contractor shall have the same responsibilities for cutting and patching as are described for the Contractor in Section 3.14.

### § 6.3 Owner's Right to Clean Up

If a dispute arises among the Contractor, Separate Contractors, and the Owner as to the responsibility under their respective contracts for maintaining the premises and surrounding area free from waste materials and rubbish, the Owner may clean up and the Architect will allocate the cost among those responsible.

## ARTICLE 7 CHANGES IN THE WORK

### § 7.1 General

§ 7.1.1 Changes in the Work may be accomplished after execution of the Contract, and without invalidating the Contract, by Change Order, Construction Change Directive or order for a minor change in the Work, subject to the limitations stated in this Article 7 and elsewhere in the Contract Documents.

§ 7.1.2 Notwithstanding any provision to the contrary in the Contract Documents, a Change Order shall be based upon agreement among the Owner or the Owner's authorized representative, the Contractor and the Lender to the Work, as applicable. Failure of the Lender to the Work to approve a Change Order shall not be grounds for finding any party to this Contract in default. A Construction Change Directive may or may not be agreed to by the Contractor. When submitting its proposed Change Order, the Contractor shall include a detailed breakdown of the impact of the proposed change on the cost of labor, materials, and the Schedule, and shall furnish documentation regarding the proposed Change Order, including spreadsheets upon request of the Owner or Architect. The Contractor shall submit Change Orders within fourteen (14) days of the date the Contractor discovers the circumstances giving rise to the Change Order request.

§ 7.1.3 Changes in the Work shall be performed under applicable provisions of the Contract Documents. The Contractor shall proceed promptly with changes in the Work, unless otherwise provided in the Change Order, Construction Change Directive, or order for a minor change in the Work.

§ 7.1.4 Notwithstanding any provision to the contrary in the Contract Documents, no Change in the Work, whether by way of alteration or addition to the Work, shall be the basis for an addition to the Contract Sum or a change in the Contract Time unless and until such alteration or addition has been authorized by a Change Order or Construction Change Directive executed and issued in accordance with and in strict compliance with the requirements of the Contract Documents.

This requirement is of the essence of the Contract Documents. Accordingly, in the absence of an executed Change Order, no (1) course of conduct or dealings between the parties, nor (2) express or implied acceptance of alterations or additions to the Work, nor (3) any claims that the Owner has been unjustly enriched by any alterations or additions to the Work (whether or not there is in fact any such unjust enrichment) shall be the basis for any claim by the Contractor to increase the Contract Sum or to change the Contract Time. All Change Orders shall be final and binding on the Owner and the Contractor.

### § 7.2 Change Orders

§ 7.2.1 A Change Order is a written instrument prepared by the Architect based on information provided by the Contractor and signed by the Owner, Contractor, and Architect stating their agreement upon all of the following:

- .1 The change in the Work;
- .2 The amount of the adjustment, if any, in the Contract Sum; and



.3 The extent of the adjustment, if any, in the Contract Time.

§ 7.2.2 Agreement on any Change Order shall constitute a final settlement of all matters relating to the change in the Work that is the subject of the Change Order, including, but not limited to, all direct and indirect costs associated with such change and any and all adjustments to the Contract Sum and the Contract Time.

### § 7.3 Construction Change Directives

§ 7.3.1 A Construction Change Directive is a written order prepared by the Architect and signed by the Owner and Architect, directing a change in the Work prior to agreement on adjustment, if any, in the Contract Sum or Contract Time, or both. The Owner may by Construction Change Directive, without invalidating the Contract, order changes in the Work within the general scope of the Contract consisting of additions, deletions, or other revisions, the Contract Sum and Contract Time being adjusted accordingly.

§ 7.3.2 A Construction Change Directive shall be used in the absence of total agreement on the terms of a Change Order.

§ 7.3.3 If the Construction Change Directive provides for an adjustment to the Contract Sum, the adjustment shall be based on one of the following methods:

- .1 Mutual acceptance of a lump sum properly itemized and supported by sufficient substantiating data to permit evaluation;
- .2 Unit prices stated in the Contract Documents or subsequently agreed upon;
- .3 Cost to be determined in a manner agreed upon by the parties and a mutually acceptable fixed or percentage fee; or
- .4 As provided in Section 7.3.4.

§ 7.3.4 If the Contractor does not respond promptly or disagrees with the method for adjustment in the Contract Sum, the Architect and the Owner shall determine the adjustment on the basis of reasonable expenditures and savings of those performing the Work attributable to the change, including, in case of an increase in the Contract Sum, an amount for overhead and profit as set forth in the Agreement, or if no such amount is set forth in the Agreement, a reasonable amount. In such case, and also under Section 7.3.3.3, the Contractor shall keep and present, in such form as the Architect may prescribe, an itemized accounting together with appropriate supporting data. Unless otherwise provided in the Contract Documents, costs for the purposes of this Section 7.3.4 shall be limited to the following:

- .1 Costs of labor, including applicable payroll taxes, fringe benefits required by agreement or custom, workers' compensation insurance, and other employee costs approved by the Architect and the Owner;
- .2 Costs of materials, supplies, and equipment, including cost of transportation, whether incorporated or consumed;
- .3 Rental costs of machinery and equipment, exclusive of hand tools, whether rented from the Contractor or others;
- .4 Costs of premiums for all bonds and insurance, permit fees, and sales, use, or similar taxes, directly related to the change; and
- .5 Costs of supervision and field office personnel directly attributable to the change.

§ 7.3.5 If the Contractor disagrees with the adjustment in the Contract Time, the Contractor may make a Claim in accordance with applicable provisions of Article 15.

§ 7.3.6 Upon receipt of a Construction Change Directive, the Contractor shall promptly proceed with the change in the Work involved and advise the Architect and the Owner of the Contractor's agreement or disagreement with the method, if any, provided in the Construction Change Directive for determining the proposed adjustment in the Contract Sum or Contract Time.

§ 7.3.7 A Construction Change Directive signed by the Contractor indicates the Contractor's agreement therewith, including adjustment in Contract Sum and Contract Time or the method for determining them. Such agreement shall be effective immediately and shall be recorded as a Change Order.

§ 7.3.8 The amount of credit to be allowed by the Contractor to the Owner for a deletion or change that results in a net decrease in the Contract Sum shall be actual net cost as confirmed by the Architect. When both additions and credits covering related Work or substitutions are involved in a change, the allowance for overhead and profit shall be figured on the basis of net increase, if any, with respect to that change.

§ 7.3.9 Pending final determination of the total cost of a Construction Change Directive to the Owner, the Contractor may request payment for Work completed under the Construction Change Directive in Applications for Payment. The Architect will make an interim determination for purposes of monthly certification for payment for those costs and certify for payment the amount that the Architect determines, in the Architect's professional judgment, to be reasonably justified. The Architect's interim determination of cost shall adjust the Contract Sum on the same basis as a Change Order, subject to the right of either party to disagree and assert a Claim in accordance with Article 15.

§ 7.3.10 When the Owner and Contractor agree with a determination made by the Architect concerning the adjustments in the Contract Sum and Contract Time, or otherwise reach agreement upon the adjustments, such agreement shall be effective immediately and shall be documented by preparation and execution of an appropriate Change Order. Change Orders may be issued for all or any part of a Construction Change Directive.

#### § 7.4 Minor Changes in the Work

The Architect may order minor changes in the Work that are consistent with the intent of the Contract Documents and do not involve an adjustment in the Contract Sum or an extension of the Contract Time, and if the Owner does not object to the change in advance of the issuance of the order. The Architect's order for minor changes shall be in writing. If the Contractor believes that the proposed minor change in the Work will affect the Contract Sum or Contract Time, the Contractor shall notify the Architect and the Owner and shall not proceed to implement the change in the Work. If the Contractor performs the Work set forth in the Architect's order for a minor change without prior notice to the Architect and the Owner that such change will affect the Contract Sum or Contract Time, the Contractor waives any adjustment to the Contract Sum or extension of the Contract Time.

### ARTICLE 8 TIME

#### § 8.1 Definitions

§ 8.1.1 Unless otherwise provided, Contract Time is the period of time, including authorized adjustments, allotted in the Contract Documents for Substantial Completion of the Work.

§ 8.1.2 The date of commencement of the Work is the date established in the Agreement.

§ 8.1.3 The date of Substantial Completion is the date certified by the Architect in accordance with Section 9.8.

§ 8.1.4 The term "day" as used in the Contract Documents shall mean calendar day unless otherwise specifically defined.

#### § 8.2 Progress and Completion

§ 8.2.1 Time limits stated in the Contract Documents are of the essence of the Contract. By executing the Agreement, the Contractor has accounted for and anticipated foreseeable delays (including, but not limited to, delays due to weather) and confirms that the Contract Time is a reasonable period for performing the Work.

§ 8.2.2 The Contractor shall not knowingly, except by agreement or instruction of the Owner in writing, commence the Work prior to the effective date of insurance required to be furnished by the Contractor and Owner. Unless the date of commencement is established by the Contract Documents or a notice to proceed given by the Owner, the Contractor shall notify the Owner in writing not less than five days or other agreed period before commencing the Work to permit the timely filing of mortgages, mechanic's liens and other security interests.

§ 8.2.3 The Contractor shall proceed expeditiously with adequate forces and shall achieve Substantial Completion within the Contract Time.

#### § 8.3 Delays and Extensions of Time

§ 8.3.1 Except as set forth below, the occurrence of events that delay the Work shall not excuse the Contractor from its obligations to achieve completion of the Work within the Contract Time. The Contract Time may be extended by Change Order for each day the Contractor is delayed in the commencement or progress of the Work provided that the Contractor demonstrates that the following conditions have been met:

- .1 at the time that the event causing the delay commences, the Contractor is in compliance with the Contract Documents and has provided the Owner with the most recent update to the Schedule;

- .2 performance of the Work is not, was not, or would not have been delayed by any other cause for which the Contractor is not entitled to an extension in the Contract Time under the Contract Documents;
- .3 the delay is not caused, or could not reasonably have been anticipated, by the Contractor;
- .4 the delay could not be limited or avoided by the Contractor's timely notice to the Owner of the delay or reasonable likelihood that the delay would occur;
- .5 the delay is of a duration of more than one day;
- .6 the delay will prevent the Contractor from achieving substantial completion within the Contract Time; and
- .7 the delay is caused by: (i) labor disputes, fire, acts of the public enemy, unavoidable casualties or other similar causes beyond the Contractor's control; (ii) unknown physical site conditions which could not have been ascertainable from an inspection of the site, from information available from the local municipality and other public bodies or from the Contract Documents; (iii) errors or omissions in the Plans and Specifications; (iv) the Owner's decision to suspend the Work unless such decision is the result of a breach by the Contractor of its obligations under the Contract Documents; (v) the failure of the Owner to timely perform any Contract obligation unless such failure is the result of a breach by the Contractor of its obligations under the Contract Documents; or (vi) the Owner's decision to materially change the scope of the Work unless such decision is the result of a breach by the Contractor of its obligations under the Contract Documents.

§ 8.3.2 Claims relating to time shall be made in accordance with applicable provisions of Article 7.

§ 8.3.3 Notwithstanding anything to the contrary in the Contract Documents, an extension in the Contract Time, to the extent permitted under Subparagraph 8.3.1 shall be the sole remedy of the Contractor for any (1) delay in the commencement, prosecution, or completion of the Work, (2) hindrance or obstruction in the performance of the Work, (3) loss of productivity, or (4) other similar claims (collectively referred to in this Subparagraph 8.3.3 as "Delays") whether or not such Delays are foreseeable. The Contractor shall not be entitled to any compensation or recovery of any damages in connection with any Delay, including, without limitation, consequential damages, lost opportunity costs, impact damages, or other similar remuneration. The Owner's exercise of any of its right or remedies under the Contract Documents (including, without limitation, ordering changes in the Work, or directing suspension, rescheduling, or correction of the Work), regardless of the extent or frequency of the Owner's exercise of such rights or remedies, shall not be construed as active interference with the Contractor's performance of the Work.

## ARTICLE 9 PAYMENTS AND COMPLETION

### § 9.1 Contract Sum

§ 9.1.1 The Contract Sum is stated in the Agreement and, including authorized adjustments, is the total amount payable by the Owner to the Contractor for performance of the Work under the Contract Documents.

§ 9.1.2 If unit prices are stated in the Contract Documents or subsequently agreed upon, and if quantities originally contemplated are materially changed in a proposed Change Order so that application of such unit prices to the actual quantities causes substantial inequity to the Owner or Contractor, the applicable unit prices shall be equitably adjusted.

### § 9.2 Schedule of Values

The schedule of values allocating the entire Contract Sum to the various portions of the Work is attached to the Agreement as an Exhibit. This schedule, unless objected to by the Architect or Owner, shall be used as a basis for reviewing the Contractor's Applications for Payment. Any changes to the schedule of values shall be submitted to the Architect and Owner and supported by such data to substantiate its accuracy as the Architect or Owner may require, and unless objected to by the Architect or Owner, shall be used as a basis for reviewing the Contractor's subsequent Applications for Payment. The schedule of values, and any amendment thereto approved in writing by the Owner pursuant to a Change Order, shall indicate which work will be completed by Subcontractors and which work will be completed by the Contractor's own forces. General Conditions, overhead and profit shall be called out as separate items.

### § 9.3 Applications for Payment

§ 9.3.1 At least ten days before the date established for each progress payment, unless otherwise required by the Contract Documents, the Contractor shall submit to the Architect an itemized Application for Payment prepared in accordance with the schedule of values, if required under Section 9.2, for completed portions of the Work. The application shall be notarized, if required, and supported by all data substantiating the Contractor's right to payment that the Owner or Architect require, such as copies of requisitions, and releases and waivers of liens from Subcontractors and suppliers, and shall reflect retainage if provided for in the Contract Documents.

§ 9.3.1.1 As provided in Section 7.3.9, such applications may include requests for payment on account of changes in the Work that have been properly authorized by Construction Change Directives, or by interim determinations of the Architect, approved by the Owner, but not yet included in Change Orders.

§ 9.3.1.2 Applications for Payment shall not include requests for payment for portions of the Work for which the Contractor does not intend to pay a Subcontractor or supplier, unless such Work has been performed by the Contractor, or by others whom the Contractor intends to pay.

§ 9.3.2 Unless otherwise provided in the Contract Documents, payments shall be made on account of materials and equipment delivered and suitably stored at the site for subsequent incorporation in the Work. If approved in advance by the Owner and the Owner's Lender(s), as applicable, payment may similarly be made for materials and equipment suitably stored off the site at a location agreed upon in writing. Payment for materials and equipment stored on or off the site shall be conditioned upon compliance by the Contractor with procedures satisfactory to the Owner to establish the Owner's title to such materials and equipment or otherwise protect the Owner's interest, and shall include the costs of applicable insurance, storage, and transportation to the site, for such materials and equipment stored off the site.

§ 9.3.3 The Contractor warrants that title to all Work covered by an Application for Payment will pass to the Owner no later than the time of payment. The Contractor further warrants that upon submittal of an Application for Payment all Work for which Certificates for Payment have been previously issued and payments received from the Owner shall, to the best of the Contractor's knowledge, information, and belief, be free and clear of liens, claims, security interests, or encumbrances, in favor of the Contractor, Subcontractors, suppliers, or other persons or entities that provided labor, materials, and equipment relating to the Work.

§ 9.3.4 **Lien Waivers and Releases.** With each Application for Payment, the Contractor shall furnish the Owner with waivers and releases from all Subcontractors and material persons and/or the subcontractors thereof, in such form as is acceptable to the Owner. The waiver and release forms to be submitted with each Application for Payment shall be consistent with California law (current version of California Civil Code Sections 8132-8138) and shall include the following:

- (a) completed conditional waiver and release forms for all Subcontractors (and their lower tier subcontractor, if any) for whose work in the preceding month payment is sought in the Application for Payment; and
- (b) completed unconditional waiver and release forms for all Subcontractors and all of their lower tier subcontractor and material persons for whose work and/or materials payment was made by the Owner in response to the Contractor's immediately preceding Application for Payment.

Each waiver and release form shall cover all Work, labor and materials, including, but not limited to equipment and fixtures of all kinds, done, performed or furnished in connection with the portion of the Work included in the Application for Payment to which it pertains, and it shall be completed in all respects and shall be signed only by an authorized representative of the Subcontractor or material persons named therein.

In addition to producing such waivers, if requested by Owner, the Contractor shall obtain, and maintain, a bond, in a form and from such surety as is acceptable to the Owner, sufficient to satisfy and/or release all potential claims, including attorneys' fees and other costs, related to all claims and/or lien rights of entities who will not provide such waivers. If the Contractor fails to provide such waivers or bond, the Owner may elect to either (1) withhold from any Progress Payment or any payment due an amount up to one hundred and fifty percent (150%) of the amount necessary to satisfy any anticipated claims by subcontractors, material suppliers and lower tier subcontractors and material suppliers, including anticipated costs and fees, or (2) release the Progress Payment or other payment due. Failure of the Owner to withhold any or part of any payment pursuant to this Section shall not be a waiver of any right

of the Owner under the Contract. Withholding of any payment or part of any payment by the Owner pursuant to this Section shall not be a breach of the Contract.

**§ 9.3.5 Contractor's Obligation to Maintain Lien-Free Title.** If any claim of mechanic's lien or stop notice is filed or made against the real property of the Work, the Contractor shall immediately pay and fully discharge the mechanic's lien or stop notice claim, or, in the alternative, may deliver to the Owner a release of lien or stop notice by surety bond in a legally sufficient form and amount to discharge the mechanic's lien or stop notice. The Contractor shall provide whatever documentation, deposits or surety is reasonably required by the title insurance company providing title insurance on the Work in order to obtain lien-free endorsements prior to the Owner's payment of any payment, including any Progress Payment. If the Contractor fails to immediately provide the documentation, deposits, records of payment or surety bonds required by this Section, the Owner may (1) obtain any deposits or surety, or (2) make payments to claimants against the Work, the Contractor, the Owner or the Owner's affiliates in good faith, as reasonably required to release the mechanic's lien or stop notice claim. The Owner may withhold the cost of obtaining such deposits or surety or of making such payments from any payment that would otherwise be due to the Contractor. Failure of the Owner to withhold any or part of any payment pursuant to this Section shall not be a waiver of any right of the Owner under the Contract. Withholding of any payment or part of any payment by the Owner pursuant to this Section shall not be a breach of the Contract.

**§ 9.3.6 Withholding of Payments Due to Claims of Subcontractors.** If any Subcontractor, material supplier to the Work, or lower tier subcontractor or material supplier files or serves any claim or lien, stop notice, common count or other demand for payment against the Owner, or the real property of the Work, the Owner may either (1) withhold from any Progress Payment or other payment an amount up to one hundred and fifty percent (150%) of the amount necessary to satisfy the claim, stop notice, common count or other demand for payment, including all anticipated costs and fees related to the defense of such claim, including but not limited to attorneys' fees, or (2) release the Progress Payment or other payment. Failure of the Owner to withhold any or part of a Progress Payment pursuant to this Section shall not be a waiver of any right of the Owner under the Contract. Withholding of any payment by the Owner pursuant to this Section shall not be a breach of the Contract.

#### **§ 9.4 Certificates for Payment**

**§ 9.4.1** The Architect will, within seven days after receipt of the Contractor's draft Certificate for Payment, (which shall be delivered by the Contractor to the Architect and the Owner concurrently with the submission of the Application for Payment) subject to the Owner's review, either (1) approve the draft Certificate for Payment in the full amount of the Application for Payment, or (2) approve the draft Certificate for Payment for such amount as the Architect determines is properly due, and notify the Contractor and Owner of the Architect's reasons for withholding certification in part as provided in Section 9.5.1; or (3) withhold approval of the entire draft Certificate for Payment, and notify the Contractor and Owner of the Architect's reason for withholding approval of the draft Certificate for Payment in whole as provided in Section 9.5.1.

**§ 9.4.2** The approval of a Certificate for Payment will constitute a representation by the Architect to the Owner, based on the Architect's evaluation of the Work and the data in the Application for Payment, that, to the best of the Architect's knowledge, information, and belief, the Work has progressed to the point indicated, the quality of the Work is in accordance with the Contract Documents, and that the Contractor is entitled to payment in the amount certified. The foregoing representations are subject to an evaluation of the Work for conformance with the Contract Documents upon Substantial Completion, to results of subsequent tests and inspections, to correction of minor deviations from the Contract Documents prior to completion, and to specific qualifications expressed by the Architect. However, the approval of a Certificate for Payment will not be a representation that the Architect has (1) made exhaustive or continuous on-site inspections to check the quality or quantity of the Work; (2) reviewed construction means, methods, techniques, sequences, or procedures; (3) reviewed copies of requisitions received from Subcontractors and suppliers and other data requested by the Owner to substantiate the Contractor's right to payment; or (4) made examination to ascertain how or for what purpose the Contractor has used money previously paid on account of the Contract Sum.

**§ 9.4.3** The issuance of a Certificate for Payment may require the approval of the Lenders.

#### **§ 9.5 Decisions to Withhold Certification**

**§ 9.5.1** The Architect may withhold approval of a Certificate for Payment in whole or in part, to the extent reasonably necessary to protect the Owner, if in the Architect's opinion the representations to the Owner required by Section 9.4.2 cannot be made. If the Architect is unable to certify payment in the amount of the Application, the Architect will notify the Contractor and Owner as provided in Section 9.4.1. If the Contractor and Architect cannot agree on a revised

amount, the Architect, with the consent of the Owner, will promptly approve a Certificate for Payment for the amount for which the Architect is able to make such representations to the Owner. The Architect may also withhold approval of a Certificate for Payment or, because of subsequently discovered evidence, may nullify the whole or a part of a Certificate for Payment previously issued, to such extent as may be necessary in the Architect's opinion to protect the Owner from loss for which the Contractor is responsible, including loss resulting from acts and omissions described in Section 3.3.2, because of

- .1 defective Work not remedied;
- .2 third party claims filed or reasonable evidence indicating probable filing of such claims, unless security acceptable to the Owner is provided by the Contractor;
- .3 failure of the Contractor to make payments properly to Subcontractors or suppliers for labor, materials or equipment;
- .4 reasonable evidence that the Work cannot be completed for the unpaid balance of the Contract Sum;
- .5 damage to the Owner or a Separate Contractor;
- .6 reasonable evidence that the Work will not be completed within the Contract Time, and that the unpaid balance would not be adequate to cover actual or liquidated damages for the anticipated delay;
- .7 Failure to provide conditional or unconditional releases from any Subcontractor or supplier as required by the Contract Documents; or
- .8 failure to carry out the Work in accordance with the Contract Documents.

§ 9.5.2 If the Contractor disputes any determination by the Architect with respect to any Certificate for Payment, the Contractor shall nevertheless expeditiously continue to prosecute the Work.

§ 9.5.3 When the reasons for withholding certification are removed, certification will be made for amounts previously withheld.

§ 9.5.4 The Owner may, at its sole option, issue joint checks to the Contractor and to any Subcontractor or supplier. If the Owner makes payments by joint check, the Owner shall notify the Architect and the Contractor shall reflect such payment on its next Application for Payment. The Contractor and the Subcontractor shall be responsible for the allocation and disbursement of funds included as part of any such joint payment. In no event shall any joint payment be construed to create any (i) contract between the Owner and the subcontractor, (ii) obligations from the Owner to such subcontractor, or (iii) rights in such subcontractor against the Owner.

§ 9.5.5 The Owner shall not be deemed to be in breach of this Contract by reason of the withholding of any payment from the Contractor in whole or in part when (1) the Architect has withheld a Certificate of Payment in order to protect the Owner from loss because of the items listed in Subparagraph 9.5.1, or (2) the Owner has determined in good faith that such payment must be withheld to protect the Owner from loss because of the items listed in Subparagraph 9.5.1.

## § 9.6 Progress Payments

§ 9.6.1 After the Architect has approved a Certificate for Payment, the Owner shall make payment in the manner and within the time provided in the Contract Documents, and shall so notify the Architect.

§ 9.6.2 The Contractor shall pay each Subcontractor, no later than seven days after receipt of payment from the Owner, the amount to which the Subcontractor is entitled, reflecting percentages actually retained from payments to the Contractor on account of the Subcontractor's portion of the Work. The Contractor shall, by appropriate agreement with each Subcontractor, require each Subcontractor to make payments to Sub-subcontractors in a similar manner.

## § 9.6.3 INTENTIONALLY DELETED.

§ 9.6.4 The Owner has the right to request written evidence from the Contractor that the Contractor has properly paid Subcontractors and suppliers amounts paid by the Owner to the Contractor for subcontracted Work. If the Contractor fails to furnish such evidence within seven days, the Owner shall have the right to contact Subcontractors and suppliers to ascertain whether they have been properly paid. Neither the Owner nor Architect shall have an obligation to pay, or to see to the payment of money to, a Subcontractor or supplier, except as may otherwise be required by law.

§ 9.6.5 The Contractor's payments to suppliers shall be treated in a manner similar to that provided in Sections 9.6.2, and 9.6.4.

§ 9.6.6 A Certificate for Payment, a progress payment, or partial or entire use or occupancy of the Project by the Owner shall not constitute acceptance of Work not in accordance with the Contract Documents.

§ 9.6.7 INTENTIONALLY DELETED.

§ 9.6.8 The Contractor shall defend the Owner (and the Owner's partners or members, as applicable), the Owner's affiliates and employees, and successors in any and all actions brought by Subcontractors or material suppliers against the Owner to foreclose a mechanic's lien on the real property of the Work, to enforce any stop notice against the Work or for common counts or any other claim arising out of the Work, except if such actions or claims are caused solely by the Owner's failure to pay the Contractor in breach of its obligation under the terms of this Contract. The Contractor shall indemnify the Owner and its affiliates and employees, and successors with respect to such actions or claims, including, but not limited to, reasonable attorneys' fees, and for amounts paid by the Owner in good faith settlement of mechanic's lien foreclosure, stop notice and common counts actions against the real property of the Work.

§ 9.7 Failure of Payment

§ 9.7.1 If the Architect does not approve a Certificate for Payment, through no fault of the Contractor, within seven days after receipt of the Contractor's Application for Payment, or if the Owner does not pay the Contractor within seven days after the date established in the Contract Documents, the amount certified by the Architect or awarded by binding dispute resolution, then the Contractor may, upon seven additional days' notice to the Owner and Architect, stop the Work until payment of the amount owing has been received.

§ 9.7.2 If the Owner is entitled to reimbursement or payment from the Contractor under or pursuant to the Contract Documents, such payment shall be made promptly upon demand by the Owner. Notwithstanding anything contained in the Contract Documents to the contrary, if the Contractor fails to promptly make any payment due the Owner, or if the Owner incurs reasonable costs and expenses related to cure of any default of the Contractor or to correct defective Work, the Owner shall have an absolute right to offset such amount against the Contract Sum and may, at the Owner's sole discretion, elect either to (1) deduct an amount equal to the amount to which the Owner is entitled from any payment thereafter due the Contractor from the Owner, or (2) issue a written notice to the Contractor reducing the Contract Sum by an amount equal to that which the Owner is entitled.

§ 9.8 Substantial Completion

§ 9.8.1 Substantial Completion is the stage in the progress of the Work when the Work or designated portion thereof is sufficiently complete in accordance with the Contract Documents so that the Owner can occupy or utilize the Work for its intended use; provided, however, that as a condition precedent to Substantial Completion, the Owner has received a certificate of occupancy (or equivalent permit sign-off) and any other permits, approvals, licenses and other documents from any governmental authority having jurisdiction thereof necessary for the beneficial occupancy of the Project, which are the responsibility of the Contractor. The Contractor shall perform the Work such that the Owner may obtain a final certificate of occupancy within the time required by any temporary certificate of occupancy.

§ 9.8.2 When the Contractor considers that the Work, or a portion thereof which the Owner agrees to accept separately, is substantially complete, the Contractor shall notify the Architect and the Owner of such determination. Promptly thereafter, the Owner or the Architect shall prepare a comprehensive list of items, to be completed or corrected by the Contractor prior to final payment (the "Punchlist"). Failure to include an item on such list does not alter the responsibility of the Contractor to complete all Work in accordance with the Contract Documents.

§ 9.8.3 No later than ten (10) days following the Contractor's receipt of the Punchlist, the Contractor shall complete and/or correct the items designated therein, and submit a request to the Owner for an additional inspection to determine substantial completion. No later than ten (10) days following the Owner's receipt of the Contractor's request, the Owner or , the Architect will make an inspection to determine whether the Work or designated portion thereof is substantially complete. If the Architect's or the Owner's inspection discloses any item, whether or not included on the Punchlist, which is not sufficiently complete in accordance with the Contract Documents so that the Owner can occupy or utilize the Work or designated portion thereof for its intended use, the Contractor shall, before issuance of the Certificate of Substantial Completion, complete or correct such item upon notification by the Architect and the Owner. In such case, the Contractor shall then submit a request for another inspection by the Architect to determine Substantial Completion. In the event that such items are not reasonably completed or corrected by this inspection and additional visits by the Owner and Architect are required thereafter, then the Contractor shall pay for the costs of the hourly service charge of the Architect.

§ 9.8.4 When the Work or designated portion thereof is substantially complete, the Architect will prepare a Certificate of Substantial Completion that, when signed by the Owner, shall establish the date of Substantial Completion; establish responsibilities of the Owner and Contractor for security, maintenance, heat, utilities, damage to the Work and insurance; and fix the time within which the Contractor shall finish all items on the list accompanying the Certificate. Warranties required by the Contract Documents shall commence on the date of Substantial Completion of the Work or designated portion thereof unless otherwise provided in the Certificate of Substantial Completion.

§ 9.8.5 The Certificate of Substantial Completion shall be submitted to the Owner and Contractor for their written acceptance of responsibilities assigned to them in the Certificate.

§ 9.8.6 If the Certificate of Substantial Completion is conditioned upon, or contains any list of, unfinished items which must be completed or corrected whether or not such items appeared on the initial Punchlist, or if any time prior to Final Payment, Owner discovers additional items which must be completed or corrected, the Owner may withhold from any payment otherwise due under this Contract, including any remaining Progress Payment, Final Payment or any retained percentage, an additional amount not more than 150% of the cost of completing those items.

If a percentage of payment is withheld, the estimated completion costs shall be determined by the Owner in good faith. If the Owner withholds any payment or percentage of payment pursuant to this Section, such payment or percentage of payment shall not be released to the Contractor until each item has been corrected and inspected by the Owner. Withholding of any amount by the Owner pursuant to this Section shall not be a breach of this Contract. Failure of the Owner to withhold any amount pursuant to this Section shall not prejudice any legal rights of the Owner or constitute a waiver of any kind.

#### § 9.9 Partial Occupancy or Use

§ 9.9.1 The Owner may occupy or use any completed or partially completed portion of the Work at any stage when such portion is designated by separate agreement with the Contractor, provided such occupancy or use is consented to by the insurer and authorized by public authorities having jurisdiction over the Project. Such partial occupancy or use may commence whether or not the portion is substantially complete, provided the Owner and Contractor have accepted in writing the responsibilities assigned to each of them for payments, retainage, if any, security, maintenance, heat, utilities, damage to the Work and insurance, and have agreed in writing concerning the period for correction of the Work and commencement of warranties required by the Contract Documents. When the Contractor considers a portion substantially complete, the Contractor shall prepare and submit a list to the Architect as provided under Section 9.8.2. Consent of the Contractor to partial occupancy or use shall not be unreasonably withheld. The stage of the progress of the Work shall be determined by written agreement between the Owner and Contractor or, if no agreement is reached, by decision of the Architect.

§ 9.9.2 Immediately prior to such partial occupancy or use, the Owner, Contractor, and Architect shall jointly inspect the area to be occupied or portion of the Work to be used in order to determine and record the condition of the Work.

§ 9.9.3 Unless otherwise agreed upon, partial occupancy or use of a portion or portions of the Work shall not constitute acceptance of Work not complying with the requirements of the Contract Documents.

#### § 9.10 Final Completion and Final Payment

§ 9.10.1 Upon receipt of the Contractor's notice that the Work is ready for final inspection and acceptance and upon receipt of a final Application for Payment, the Architect and the Owner will promptly make such inspection. When the Architect and the Owner finds the Work acceptable under the Contract Documents and the Contract fully performed, including, but not limited to any work set forth on the Punchlist, the Architect, with the consent of the Owner, will promptly approve a final Certificate for Payment stating that to the best of the Architect's knowledge, information and belief, and on the basis of the Architect's on-site visits and inspections, the Work has been completed in accordance with the Contract Documents and that the entire balance found to be due the Contractor and noted in the final Certificate is due and payable. The Architect's final Certificate for Payment will constitute a further representation that conditions listed in Section 9.10.2 as precedent to the Contractor's being entitled to final payment have been fulfilled. Until the time of Final Payment, the Owner shall remain the legal and beneficial owner of all retention held.

§ 9.10.2 In accordance with the Agreement, neither final payment nor any remaining retained percentage shall become due until Owner has accepted the Work and, if the Owner files a Notice of Completion, thirty-five (35) days have elapsed from such filing, or if the Owner does not file a Notice of Completion, forty-five (45) days have elapsed from



completion of the Work. If the Owner files a Notice of Completion such notice shall be filed in the office of the appropriate County Recorder, and shall be filed within the time frame provided for in California Civil Code Section 8182. The Owner shall accept the Work only after the following have occurred.

- .1 The Contractor has submitted to the Architect and the Owner: (1) an affidavit that payrolls, bills for materials and equipment, and other indebtedness connected with the Work for which the Owner or the Owner's property might be responsible or encumbered (less amounts withheld by Owner) have been paid or otherwise satisfied; (2) a certificate evidencing that insurance required by the Contract Documents to remain in force after final payment is currently in effect and will not be canceled or allowed to expire until at least 30 days' prior written notice has been given to the Owner; (3) a written statement that the Contractor knows of no reason that the insurance will not be renewable to cover the period required by the Contract Documents; (4) consent of surety, if any, to final payment; (5) three complete sets of "as built" drawings and other documents set forth in Section 3.11; (6) copies of complete installation, operation and maintenance manuals, including all manufacturers' literature, of equipment and materials used in the Project; (7) copies of all assignments of warranties of the Contractor and all Subcontractors and material persons; (8) the names, addresses and telephone numbers of all Subcontractors, and principal vendors on the Project; (9) all inspection reports, permits and if applicable, temporary and final certificates of occupancy and licenses necessary for the occupancy of the Project; and (10) a final statement of the cost of the Work allocated in accordance with the Schedule of Values, audited or certified by a certified public accountant, and in a form which has been approved by the Owner for the Work.
- .2 All persons, firms and corporations, including all laborers, material persons, suppliers and Subcontractors who have furnished equipment, supplied materials or performed work for or in connection with the Work, including but not limited to those persons who could file a claim of lien, have been paid or will be paid in full out of the remaining retained percentage; and those persons, firms and corporations have submitted their final statements with a final release and waiver of all rights to mechanic's lien, stop notice or recourse against surety on the bond (which may be subject to final payment if those persons have not been paid in full). The Contractor shall make these waivers available to the Owner for inspection by the Owner. In the event a dispute has arisen between the Contractor and one of the parties listed above in this Section which prevents the Contractor from obtaining the waiver of rights required by this Section from that party, the Contractor may satisfy the requirements of this Section by (a) supplying a payment bond issued by a surety licensed to do business in the State of California and acceptable to the Owner to remove the effect of any lien, stop notice, or related claim against the Work or the real property upon which the Work is built, and (b) agreeing to defend and indemnify the Owner against any actions filed by such person who has supplied materials to or performed work for or in connection with the Work. The Contractor shall also have submitted an affidavit to the Owner that all waivers described in this Article have been obtained from all parties described in this Article or that the claims of such parties have been satisfied by the obtaining of a bond.
- .3 All labor has been performed and materials supplied and incorporated into the Work in a good work person like manner consistent with the Contract Documents.
- .4 The Work, premises and surrounding area have been cleaned up consistent with the Contract Documents.
- .5 All portions of the Work requiring inspection by any governmental authority have been inspected and approved by such authority and all requisite certificates of occupancy, approvals, licenses and permits have been issued.
- .6 The Contractor has submitted a conditional lien waiver followed promptly by an unconditional lien waiver upon the Contractor's receipt of payment, and the Owner has assurances from the title company that the Site and the Work are free from all liens related to the Work.
- .7 The Lenders to the Work have authorized release of the Final Payment, if applicable.

§ 9.10.3 If, after Substantial Completion of the Work, final completion thereof is materially delayed through no fault of the Contractor or by issuance of Change Orders affecting final completion, and the Architect so confirms, the Owner shall, upon application by the Contractor and certification by the Architect, and without terminating the Contract, make payment of the balance due for that portion of the Work fully completed, corrected, and accepted. If the remaining balance for Work not fully completed or corrected is less than retainage stipulated in the Contract Documents, and if bonds have been furnished, the written consent of the surety and the Owner's Lenders, as applicable to payment of the balance due for that portion of the Work fully completed and accepted shall be submitted by the Contractor to the Architect prior to certification of such payment. Such payment shall be made under terms and conditions governing final payment, except that it shall not constitute a waiver of Claims.

§ 9.10.4 The making of final payment shall not constitute a waiver of any claims by the Owner.

§ 9.10.5 Acceptance of final payment by the Contractor, a Subcontractor, or a supplier, shall constitute a waiver of claims by that payee except those previously made in writing and identified by that payee as unsettled at the time of final Application for Payment.

## ARTICLE 10 PROTECTION OF PERSONS AND PROPERTY

### § 10.1 Safety Precautions and Programs

The Contractor shall be solely responsible for initiating, maintaining, and supervising all safety precautions and programs in connection with the performance of the Contract, and for providing safe conditions for the performance of the Work. Other than the portions of the site under the Owner's control and that are not subject to any portion of the Work, the Owner shall have no liability or responsibility for the physical condition or safety of the site or any improvements located on the site until acceptance of the Work by the Owner.

### § 10.2 Safety of Persons and Property

§ 10.2.1 The Contractor shall take reasonable precautions for safety of, and shall provide reasonable protection to prevent damage, injury, or loss to

- .1 employees on the Work and other persons who may be affected thereby;
- .2 the Work and materials and equipment to be incorporated therein, whether in storage on or off the site, under care, custody, or control of the Contractor, a Subcontractor, or a Sub-subcontractor; and
- .3 other property at the site or adjacent thereto, such as trees, shrubs, lawns, walks, pavements, roadways, structures, and utilities not designated for removal, relocation, or replacement in the course of construction.

§ 10.2.2 The Contractor shall comply with, and give notices required by the Applicable Requirements and lawful orders of public authorities, bearing on safety of persons or property or their protection from damage, injury, or loss.

§ 10.2.3 The Contractor shall implement, erect, and maintain, as required by existing conditions and performance of the Contract, reasonable safeguards for safety and protection, including posting danger signs and other warnings against hazards; promulgating safety regulations; and notifying the owners and users of adjacent sites and utilities of the safeguards. The Contractor shall also be responsible for, at the Contractor's sole cost and expense, all measures necessary to protect any property adjacent to the Project and improvements thereon. Any damage to such property or improvements shall be promptly repaired by the Contractor.

§ 10.2.4 When use or storage of explosives or other hazardous materials or equipment, or unusual methods are necessary for execution of the Work, the Contractor shall exercise utmost care and carry on such activities under supervision of properly qualified personnel. The Contractor shall also give the Owner and the Architect reasonable advance notice of the use or storage of explosives or other hazardous materials.

§ 10.2.5 The Contractor shall promptly remedy damage and loss (other than damage or loss insured under property insurance required by the Contract Documents) to property referred to in Sections 10.2.1.2 and 10.2.1.3 caused in whole or in part by the Contractor, a Subcontractor, a Sub-subcontractor, or anyone directly or indirectly employed by any of them, or by anyone for whose acts they may be liable and for which the Contractor is responsible under Sections 10.2.1.2 and 10.2.1.3 except damage or loss is attributable to acts or omissions of the Owner or Architect or anyone directly or indirectly employed by either of them, or by anyone for whose acts either of them may be liable,

and not attributable to the fault or negligence of the Contractor. The foregoing obligations of the Contractor are in addition to the Contractor's obligations under Section 3.18.

**§ 10.2.6** The Contractor shall designate a responsible member of the Contractor's organization at the site whose duty shall be the prevention of accidents. This person shall be the Contractor's superintendent unless otherwise designated by the Contractor in writing to the Owner and Architect.

**§ 10.2.7** The Contractor shall not permit any part of the construction or site to be loaded so as to cause damage or create an unsafe condition. When all or a portion of the Work is suspended for any reason, the Contractor shall securely fasten down all coverings and protect the Work, as necessary, from injury by any cause.

**§ 10.2.8 Injury or Damage to Person or Property**

If either party suffers injury or damage to person or property because of an act or omission of the other party, or of others for whose acts such party is legally responsible, notice of the injury or damage, whether or not insured, shall be given to the other party within a reasonable time not exceeding 21 days after discovery. The notice shall provide sufficient detail to enable the other party to investigate the matter, including, but not limited to statements of witness. In addition, if death, serious personal injuries, or material damage (including, but not limited to, any material damage within an occupied residential unit, or material damage or destruction of any personal property of Owner's tenants) occur, then the incident shall be reported immediately by telephone or messenger to the Owner and the Architect.

**§ 10.3 Hazardous Materials and Substances**

**§ 10.3.1** The Contractor is responsible for compliance with any requirements included in the Contract Documents regarding hazardous materials or substances (as defined in the Federal Comprehensive Environmental Response, Compensation and Liability Act of 1980, as amended), including but not limited to asbestos or polychlorinated biphenyl (PCB). If the Contractor encounters a hazardous material or substance not addressed in the Contract Documents and if reasonable precautions will be inadequate to prevent foreseeable bodily injury or death to persons resulting from such a material or substance, encountered on the site by the Contractor, the Contractor shall, upon recognizing the condition, immediately stop Work in the affected area and notify the Owner and Architect in writing of the condition. The Contractor shall continue all other Work that is not affected by such condition.

**§ 10.3.2** Upon receipt of the Contractor's notice, the Owner shall obtain the services of a licensed laboratory to verify the presence or absence of the material or substance reported by the Contractor and, in the event such material or substance is found to be present, to cause it to be rendered harmless. Unless otherwise required by the Contract Documents, the Owner shall furnish in writing to the Contractor and Architect the names and qualifications of persons or entities who are to perform tests verifying the presence or absence of the material or substance or who are to perform the task of removal or safe containment of the material or substance. The Contractor and the Architect will promptly reply to the Owner in writing stating whether or not either has reasonable objection to the persons or entities proposed by the Owner. If either the Contractor or Architect has an objection to a person or entity proposed by the Owner, the Owner shall propose another to whom the Contractor and the Architect have no reasonable objection. When the material or substance has been rendered harmless, Work in the affected area shall resume upon written agreement of the Owner and Contractor. By Change Order, the Contract Time shall be extended appropriately and the Contract Sum shall be increased by the amount of the Contractor's reasonable additional costs of shutdown, delay, and start-up. The term "rendered harmless" shall be interpreted to mean that levels of asbestos and polychlorinated biphenyls are less than any applicable exposure standards set forth in Occupational Safety and Health Administration regulations or that any excess of such standards has been encapsulated or other such action has been taken such that the levels are no longer harmful.

**§ 10.3.3 Intentionally Deleted.**

**§ 10.3.4** Contractor shall not permit any hazardous material or substance to be brought to or used on the Project site except to the extent such hazardous material or substance is necessary to and customarily used in the construction or residential projects like the Project. Any hazardous material or substance brought or used on the Project site by the Contractor, any Subcontractor, any material supplier, or any entity for whom any of them is responsible, shall be used, stored and disposed of in compliance with all applicable laws related to such hazardous materials or substances. Any damage to the property referred to in Sections 10.2.1.2 and 10.2.1.3 resulting from the improper storage or use of hazardous materials or substances shall be remedied by the Contractor at its sole cost and expense in accordance with applicable laws. The Contractor shall provide the Owner notice of any release of hazardous materials or substance at the Project site. In no event, however, shall the Owner have any responsibility for any substance or material that is

brought to the Project site by the Contractor, any Subcontractor, any material supplier, or any entity for whom any of them is responsible. The Contractor agrees not to import any fill that are hazardous, toxic or made up of any items that are hazardous or toxic.

**§ 10.3.5** The Contractor shall indemnify the Owner for the cost and expense the Owner incurs (1) for remediation of hazardous materials or substances the Contractor brings to the site and negligently handles, or (2) where the Contractor fails to perform its obligations under Section 10.3.1, except to the extent that the cost and expense are due to the Owner's fault or negligence.

**§ 10.3.6** If, without negligence or willful misconduct on the part of the Contractor, the Contractor is held liable by a government agency for the cost of remediation of a hazardous material or substance solely by reason of performing Work as required by the Contract Documents, the Owner shall reimburse the Contractor for all cost and expense thereby incurred.

**§ 10.3.7** If Contractor's scope of work includes the off-haul of contaminated soil, hazardous materials (including asbestos) remediation, or mold remediation, Contractor shall comply with the requirements of all applicable federal, state and local laws, and any environmental reports and any mold remediation plan provided to Contractor by Owner, in the removal, transportation and disposal of the materials. Contractor shall obtain all necessary permits for any contaminated soil or hazardous materials or mold removal work. The Contractor shall indemnify, defend, and hold harmless the Owner, and Owner's officers, directors, employees, agents, affiliates and Lenders to the Project, from and against claims, damages, losses and expenses, including but not limited to attorneys' fees, arising out of or resulting from the performance of such work, including, but not limited to, any claim made by Owner's tenants in connection with such work. The Contractor shall ensure that any Subcontractor performing any removal or remediation work possesses the necessary expertise, insurance and licenses. All contaminated and hazardous material shall be transported to an appropriately permitted facility. The Contractor shall and shall cause any Subcontractors performing the removal and remediation work to take all necessary safety precautions during the performance of the work including but not limited to necessary protection of surrounding areas to prevent the spread of contamination, the protection of workers performing the removal and remediation work, and the protection of the health and safety of Owner's tenants.

#### **§ 10.4 Emergencies**

In an emergency affecting safety of persons or property, the Contractor shall act, at the Contractor's discretion, to prevent threatened damage, injury, or loss. Additional compensation or extension of time claimed by the Contractor on account of an emergency shall be determined as provided in Article 15 and Article 7.

### **ARTICLE 11 INSURANCE AND BONDS**

#### **§ 11.1 Contractor's Insurance and Bonds [See AIA Document Exhibit A for Insurance Requirements]**

**§ 11.1.1** The Contractor shall purchase and maintain insurance of the types and limits of liability, containing the endorsements, and subject to the terms and conditions, as described in the Agreement or elsewhere in the Contract Documents. The Contractor shall purchase and maintain the required insurance from an insurance company or insurance companies lawfully authorized to issue insurance in the jurisdiction where the Project is located.

**§ 11.1.2** The Contractor shall provide surety bonds of the types, for such penal sums, and subject to such terms and conditions as required by AIA Document Exhibit A for Insurance Requirements. **§ 11.1.3** Upon the request of any person or entity appearing to be a potential beneficiary of bonds covering payment of obligations arising under the Contract, the Contractor shall promptly furnish a copy of the bonds or shall authorize a copy to be furnished.

**§ 11.1.4 Notice of Cancellation or Expiration of Contractor's Required Insurance.** Within three (3) business days of the date the Contractor becomes aware of an impending or actual cancellation or expiration of any insurance required by the Contract Documents, the Contractor shall provide notice to the Owner of such impending or actual cancellation or expiration. Upon receipt of notice from the Contractor, the Owner shall, unless the lapse in coverage arises from an act or omission of the Owner, have the right to stop the Work until the lapse in coverage has been cured by the procurement of replacement coverage by the Contractor. The furnishing of notice by the Contractor shall not relieve the Contractor of any contractual obligation to provide any required coverage.

## § 11.2 Owner's Insurance

§ 11.2.1 The Owner shall purchase and maintain insurance of the types and limits of liability, containing the endorsements as the Owner deems necessary. .

§ 11.2.2 **Failure to Purchase Required Property Insurance.** If the Owner does not intend to purchase property insurance the Owner shall so inform the Contractor in writing prior to commencement of the Work. The Contractor may then effect insurance that will protect the interests of the Contractor, Subcontractors and Sub-subcontractors in the Work, and by appropriate Change Order the cost thereof shall be charged to the Owner. If the cause of any loss payment under such insurance is the fault of the Contractor, then the Contractor shall pay any deductibles.

§ 11.2.3 **Notice of Cancellation or Expiration of Owner's Required Property Insurance.** Within three (3) business days of the date the Owner becomes aware of an impending or actual cancellation or expiration of any property insurance required by the Contract Documents, the Owner shall provide notice to the Contractor of such impending or actual cancellation or expiration.

## § 11.3 Waivers of Subrogation

§ 11.3.1 If permitted by the parties' insurance companies without penalty, the Owner and Contractor waive all rights against (1) each other and any of their subcontractors, sub-subcontractors, agents, and employees, each of the other; (2) the Architect and Architect's consultants; and (3) Separate Contractors, if any, and any of their subcontractors, sub-subcontractors, agents, and employees, for damages to the Work itself caused by fire, or other causes of loss, to the extent of actual recovery of any insurance proceeds under any property insurance required by the Agreement or other property insurance applicable to the Project, except such rights as they have to proceeds of such insurance. The Owner or Contractor, as appropriate, shall require similar written waivers in favor of the individuals and entities identified above from the Architect, Architect's consultants, Separate Contractors, subcontractors, and sub-subcontractors. The policies of insurance purchased and maintained by each person or entity agreeing to waive claims pursuant to this section 11.3.1 shall not prohibit this waiver of subrogation. This waiver of subrogation shall be effective as to a person or entity (1) even though that person or entity would otherwise have a duty of indemnification, contractual or otherwise, (2) even though that person or entity did not pay the insurance premium directly or indirectly, or (3) whether or not the person or entity had an insurable interest in the damaged property.

## § 11.3.2 INTENTIONALLY DELETED.

## § 11.4 Loss of Use, Business Interruption, and Delay in Completion Insurance

The Owner, at the Owner's option, may purchase and maintain insurance that will protect the Owner against loss of use of the Owner's property, or the inability to conduct normal operations, due to fire or other causes of loss.

## § 11.5 Adjustment and Settlement of Insured Loss

§ 11.5.1 A loss insured under the property insurance required by the Agreement shall be adjusted by the Owner, in good faith, and made payable to the Owner for the insureds, as their interests may appear, subject to requirements of any applicable mortgagee clause and of Section 11.5.2.

§ 11.5.2 Prior to settlement of an insured loss, the Owner shall notify the Contractor of the terms of the proposed settlement as well as the proposed allocation of the insurance proceeds. The Contractor shall have 14 days from receipt of notice to object in writing to the proposed settlement or allocation of the proceeds. If the Contractor does not object in writing, the Owner shall settle the loss and the Contractor shall be bound by the settlement and allocation.

## ARTICLE 12 UNCOVERING AND CORRECTION OF WORK

### § 12.1 Uncovering of Work

§ 12.1.1 If a portion of the Work is covered contrary to the Architect's or Owner's request or to requirements specifically expressed in the Contract Documents, it must, if requested in writing by the Architect or the Owner, be uncovered for the Architect's and Owner's examination and be replaced at the Contractor's expense without change in the Contract Time or Contract Sum.

§ 12.1.2 If a portion of the Work has been covered that the Architect or the Owner has not specifically requested to examine prior to its being covered, the Architect with the consent of the Owner, or the Owner may request to see such Work and it shall be uncovered by the Contractor. If such Work is in accordance with the Contract Documents, the Contractor shall be entitled to an equitable adjustment to the Contract Sum and Contract Time as may be appropriate.

If such Work is not in accordance with the Contract Documents, the costs of uncovering the Work, and the cost of correction, shall be at the Contractor's expense.

## § 12.2 Correction of Work

### § 12.2.1 Before Substantial Completion

The Contractor shall promptly correct Work rejected by the Architect or Owner or failing to conform to the requirements of the Contract Documents, whether discovered before Substantial Completion and whether or not fabricated, installed or completed. Costs of correcting such rejected Work, including additional testing and inspections, the cost of uncovering and replacement, and compensation for the Architect's services and expenses made necessary thereby, shall be at the Contractor's expense.

### § 12.2.2 After Substantial Completion

§ 12.2.2.1 In addition to and not in limitation of the Contractor's obligations under Section 3.5, or any other obligation under the Contract Documents if, within one year after the date of Substantial Completion of the Work or designated portion thereof or after the date for commencement of warranties established under Section 9.9.1, or by terms of any applicable special warranty required by the Contract Documents, any of the Work is found to be not in accordance with the requirements of the Contract Documents, the Contractor shall correct it promptly after receipt of notice from the Owner to do so, unless the Owner has previously given the Contractor a written acceptance of such condition. This obligation shall also apply to any repair or replacement part of the Work that is damaged by the defective Work. If the Contractor fails to correct nonconforming Work within seven (7) days after receipt of notice from the Owner or Architect, or fails to diligently prosecute such correction to completion, the Owner may correct it in accordance with Section 2.5.

§ 12.2.2.2 The one-year period for correction of Work shall be extended with respect to portions of Work first performed after Substantial Completion by the period of time between Substantial Completion and the actual completion of that portion of the Work.

§ 12.2.2.3 Upon completion of any Work under or pursuant to this paragraph 12.2, the one (1) year correction period in connection with the Work requiring correction shall be renewed and recommence. The obligations under paragraph 12.2 shall cover any repairs and replacement to any part of the Work or other property that is damaged by the defective Work.

§ 12.2.3 The Contractor shall remove from the site portions of the Work that are not in accordance with the requirements of the Contract Documents and are neither corrected by the Contractor nor accepted by the Owner.

§ 12.2.4 In addition, if the Contractor, a Subcontractor, or any for whom either is responsible uses or damages any portion of the Work including but not limited to if caused by the Contractor's correction or removal of Work that is not in accordance with the requirements of the Contract Documents, including, without limitation, mechanical, electrical, plumbing, and other building systems, machinery, equipment, or other mechanical device, the Contractor shall cause such item to be restored to "like new" condition at no expense to the Owner. In addition, the Contractor shall promptly remedy damage and loss arising in conjunction with the Project caused in whole or in part by the Contractor, a Subcontractor, a Sub-subcontractor, or any directly or indirectly employed by any of them, or anyone for whose acts they may be liable and for which the Contractor is responsible.

§ 12.2.5 Nothing contained in this Section 12.2 shall be construed to establish a period of limitation with respect to other obligations the Contractor has under the Contract Documents. Enforcement of the Contractor's repair obligation shall be in addition to and not in limitation of any other rights or remedies available to the Owner. Establishment of the one-year period for correction of Work as described in Section 12.2.2 relates only to the specific obligation of the Contractor to correct the Work, and has no relationship to the time within which the obligation to comply with the Contract Documents may be sought to be enforced, nor to the time within which proceedings may be commenced to establish the Contractor's liability with respect to the Contractor's obligations other than specifically to correct the Work.

## § 12.3 Acceptance of Nonconforming Work

If the Owner prefers to accept Work that is not in accordance with the requirements of the Contract Documents, the Owner may do so in writing instead of requiring its removal and correction, in which case the Contract Sum will be reduced as appropriate and equitable. Such adjustment shall be effected whether or not final payment has been made.

## ARTICLE 13 MISCELLANEOUS PROVISIONS

### § 13.1 Governing Law

The Contract shall be governed by the laws of the State of California.

### § 13.2 Successors and Assigns

§ 13.2.1 The Owner and Contractor respectively bind themselves, their partners, successors, assigns, and legal representatives to covenants, agreements, and obligations contained in the Contract Documents. The Contractor shall not assign the Contract as a whole, or in any part, without the prior written consent of the Owner. If the Contractor attempts to make an assignment without such consent of the Owner, the Contractor shall nevertheless remain legally responsible for all obligations under the Contract.

§ 13.2.2 The Owner may, without consent of the Contractor, assign the Contract to a lender providing construction financing for the Project, if the lender assumes the Owner's rights and obligations under the Contract Documents. The Contractor shall execute all consents reasonably required to facilitate the assignment.

### § 13.3 Rights and Remedies

§ 13.3.1 Except as expressly provided in the Contract Documents, duties and obligations imposed by the Contract Documents and rights and remedies available thereunder shall be in addition to and not a limitation of duties, obligations, rights, and remedies otherwise imposed or available by law.

§ 13.3.2 . No waiver shall be implied from any delay or failure by the Owner to take action on any breach of the Contractor or to pursue any remedy allowed under the Contract or applicable law. Any extension of time granted to Contractor to perform any obligation under the Contract shall not operate as a waiver or release from any of its obligations under the Contract. Consent by the Owner to any act or omission by the Contractor shall not be construed to be a consent to any other or subsequent act or omission or to waive the requirement for the Owner's written consent to future waivers.

§13.3.3 In any action or proceeding to enforce, arising out of, alleging breach of, or for declaratory relief with regard to the Contract, the prevailing party shall be entitled to recover its reasonable attorneys' fees and other costs associated with the action or proceeding.

### § 13.4 Tests and Inspections

§ 13.4.1 Tests, inspections, and approvals of portions of the Work shall be made as required by the Contract Documents and by applicable laws, statutes, ordinances, codes, rules, and regulations or lawful orders of public authorities. Unless otherwise provided, the Contractor shall make arrangements for such tests, inspections, and approvals with an independent testing laboratory or entity acceptable to the Owner, or with the appropriate public authority, and shall bear all related costs of tests, inspections, and approvals. The Owner shall bear costs of tests, inspections, or approvals that do not become requirements until after bids are received or negotiations concluded. The Owner shall directly arrange and pay for tests, inspections, or approvals where building codes or applicable laws or regulations so require the property owner to do so.

§ 13.4.2 If the Architect, Owner, or public authorities having jurisdiction determine that portions of the Work require additional testing, inspection, or approval not included under Section 13.4.1, the Architect will, upon written authorization from the Owner, instruct the Contractor to make arrangements for such additional testing, inspection, or approval, by an entity acceptable to the Owner, and the Contractor shall give timely notice to the Architect of when and where tests and inspections are to be made so that the Architect may be present for such procedures. Such costs, except as provided in Section 13.4.3, shall be at the Owner's expense.

§ 13.4.3 If procedures for testing, inspection, or approval under Sections 13.4.1 and 13.4.2 reveal failure of the portions of the Work to comply with requirements established by the Contract Documents, all costs made necessary by such failure, including those of repeated procedures and compensation for the Architect's services and expenses, shall be at the Contractor's expense. The Contractor also agrees that the cost of testing services required for the convenience of the Contractor in his scheduling and performance of the Work, and the cost of testing services related to remedial operations performed to correct deficiencies in the Work, shall be borne by the Contractor.

§ 13.4.4 Required certificates of testing, inspection, or approval shall, unless otherwise required by the Contract Documents, be secured by the Contractor and promptly delivered to the Architect.

§ 13.4.5 If the Architect is to observe tests, inspections, or approvals required by the Contract Documents, the Architect will do so promptly and, where practicable, at the normal place of testing.

§ 13.4.6 Tests or inspections conducted pursuant to the Contract Documents shall be made promptly to avoid unreasonable delay in the Work.

### § 13.5 Interest

Payments due and unpaid under the Contract Documents shall bear interest from the date payment is due at the rate the parties agree upon in writing.

## ARTICLE 14 TERMINATION OR SUSPENSION OF THE CONTRACT

### § 14.1 Termination by the Contractor

§ 14.1.1 The Contractor may terminate the Contract if the Work is stopped for a period of 60 consecutive days through no act or fault of the Contractor, a Subcontractor, a Sub-subcontractor, their agents or employees, or any other persons or entities performing portions of the Work, for any of the following reasons:

- .1 Issuance of an order of a court or other public authority having jurisdiction that requires all Work to be stopped;
- .2 An act of government, such as a declaration of national emergency, that requires all Work to be stopped; or
- .3 Because the Owner has not made payment on a Certificate for Payment within the time stated in the Contract Documents.

§ 14.1.2 The Contractor may terminate the Contract if, through no act or fault of the Contractor, a Subcontractor, a Sub-subcontractor, their agents or employees, or any other persons or entities performing portions of the Work, repeated suspensions, delays, or interruptions of the entire Work by the Owner as described in Section 14.3, constitute in the aggregate more than 100 percent of the total number of days scheduled for completion, or 120 days in any 365-day period, whichever is less.

§ 14.1.3 If one of the reasons described in Section 14.1.1 or 14.1.2 exists, the Contractor may, upon seven days' notice to the Owner and Architect, terminate the Contract and recover from the Owner payment for Work executed in accordance with the Contract Documents, as well as overhead and profit on such Work due as of the termination as such amounts are determined pursuant to the Contract, and reasonable costs incurred by reason of such termination as documented by Contractor to Owner. The Owner shall be credited for (i) payments previously made to the Contractor for the terminated portion of the Work, (ii) claims that the Owner has against the Contractor under the Contract, and (iii) the value of the materials, supplies, equipment, or other items that are to be disposed of by the Contractor that are part of the Contract Sum. Such payment shall be the sole and exclusive remedy to which Contractor is entitled for termination pursuant to Sections 14.1.1, 14.1.2.

§ 14.1.4 If the Work is stopped for a period of 60 consecutive days through no act or fault of the Contractor, a Subcontractor, a Sub-subcontractor, or their agents or employees or any other persons or entities performing portions of the Work because the Owner has repeatedly failed to fulfill the Owner's obligations under the Contract Documents with respect to matters important to the progress of the Work, the Contractor may, upon seven additional days' notice to the Owner and the Architect, terminate the Contract and recover from the Owner as provided in Section 14.1.3.

### § 14.2 Termination by the Owner for Cause

§ 14.2.1 The Owner may terminate the Contract if the Contractor

- .1 repeatedly refuses or fails to supply enough properly skilled workers or proper materials;
- .2 fails to make payment to Subcontractors or suppliers in accordance with the Contract Documents and respective agreements between the Contractor and the Subcontractors or suppliers;
- .3 repeatedly disregards applicable laws, statutes, ordinances, codes, rules and regulations, or lawful orders of a public authority; or
- .4 otherwise is in breach of a provision of the Contract Documents.

§ 14.2.2 When any of the reasons described in Section 14.2.1 exist, the Owner may, without prejudice to any other rights or remedies of the Owner available at law or at equity and after giving the Contractor and the Contractor's surety, if any, seven days' notice, terminate employment of the Contractor and may, subject to any prior rights of the surety:

- .1 Exclude the Contractor from the site and take possession of all materials, equipment, tools, and construction equipment and machinery thereon owned by the Contractor;
- .2 Accept assignment of subcontracts pursuant to Section 5.4; and



- 3 Finish the Work by whatever reasonable method the Owner may deem expedient. Upon written request of the Contractor, the Owner shall furnish to the Contractor a detailed accounting of the costs incurred by the Owner in finishing the Work.

§ 14.2.3 When the Owner terminates the Contract for one of the reasons stated in Section 14.2.1, the Contractor shall not be entitled to receive further payment until all conditions set forth in Section 9.10 have been satisfied.

§ 14.2.4 If the costs of finishing the Work and all damages and costs related thereto exceed the unpaid balance of the Contract Sum, then the Contractor shall pay the difference to the Owner. This obligation for payment shall survive termination of the Contract.

§ 14.2.5 The parties acknowledge that if: (i) Contractor is adjudged as bankrupt, (ii) Contractor makes a general assignment for the benefit of creditors, (iii) a receiver is appointed for the benefit of Contractor's creditors, (iv) a receiver is appointed on account of Contractor's insolvency, or (v) the Contractor otherwise admits or acknowledges that Contractor is unable to pay its debts as they become due, then such event or occurrence could impair or frustrate Contractor's performance of this Agreement. Accordingly, it is agreed that upon such event or occurrence, Owner shall be entitled to request from Contractor, or its successor in interest, adequate assurance of future performance in accordance with the terms and conditions hereof, in a form reasonably determined by the Owner. Failure to comply with such request within ten (10) days after delivery of the request by Owner shall entitle Owner to terminate this Agreement and to the accompanying rights set forth in this Section. In all events until the Owner has received and accepted the Contractor's adequate assurance of performance and actual performance in accordance therewith, notwithstanding any provision hereof to the contrary, including, but not limited to Article 7, above, Owner shall be entitled to proceed with the Work with its own forces or with other contractors on a time and material or other appropriate basis (as determined in the sole discretion of the Owner), the cost of which will be deducted from any amounts owed to Contractor.

§ 14.2.6 If Owner terminates this Contract pursuant to this section and it shall be determined that the Owner's termination was wrongful or otherwise unjustified, then notwithstanding any other provisions of this Contract, such termination shall automatically be deemed to have been a termination for the Owner's convenience pursuant to Section 14.4 hereof, and Contractor's sole right, remedy and recourse shall be governed and determined by Section 14.4.

### § 14.3 Suspension by the Owner for Convenience

§ 14.3.1 The Owner may, without cause, order the Contractor in writing to suspend, delay or interrupt the Work, in whole or in part for such period of time as the Owner may determine.

§ 14.3.2 The Contract Sum and Contract Time shall be adjusted for increases in the cost and time caused by suspension, delay, or interruption under Section 14.3.1. No adjustment shall be made to the extent

- .1 that performance is, was, or would have been, so suspended, delayed, or interrupted, by another cause for which the Contractor is responsible; or
- .2 that an equitable adjustment is made or denied under another provision of the Contract.

### § 14.4 Termination by the Owner for Convenience

§ 14.4.1 The Owner may, at any time, terminate the Contract for the Owner's convenience and without cause.

§ 14.4.2 Upon receipt of notice from the Owner of such termination for the Owner's convenience, the Contractor shall

- .1 cease operations as directed by the Owner in the notice;
- .2 take actions necessary, or that the Owner may direct, for the protection and preservation of the Work; and
- .3 except for Work directed to be performed prior to the effective date of termination stated in the notice, terminate all existing subcontracts and purchase orders and enter into no further subcontracts and purchase orders.

§ 14.4.3 Upon such termination, the Contractor shall recover as its sole remedy payment for work properly performed in connection with the terminated portion of the Work prior to the effective date of termination and for items properly and timely fabricated off the project site, delivered and stored in accordance with the Owner's instructions. The Contractor hereby waives and forfeits all other claims for payment and damages, including, without limitation,

anticipated profits. The Owner shall be credited for (i) payments previously made to the Contractor for the terminated portion of the Work, (ii) claims that the Owner has against the Contractor under the Contract, and (iii) the value of the materials, supplies, equipment, or other items that are to be disposed of by the Contractor that are part of the Contract Sum.

§ 14.5 Upon termination of this Contract for any reason, the Contractor shall:

14.5.1 withdraw its employees, workmen, machinery and equipment from the Site in an orderly manner, as directed by the Owner;

14.5.2 furnish Owner with a complete accounting of the Cost of the Work incurred to the date of termination together with a final status report updating the progress of the Work up to the date of termination; and

14.5.3 deliver to Owner all of those items enumerated in Section 9.10.2, above, to the extent that said items are available, all Shop Drawings, Project Data and Samples available, and all other of Contractor's construction documents and records relating to the Work performed under this Contract.

## ARTICLE 15 CLAIMS AND DISPUTES

### § 15.1 Claims

#### § 15.1.1 Definition

A Claim is a demand or assertion by one of the parties seeking, as a matter of right, payment of money, or other relief with respect to the terms of the Contract. The term "Claim" also includes other disputes and matters in question between the Owner and Contractor arising out of or relating to the Contract. The responsibility to substantiate Claims shall rest with the party making the Claim. This Section 15.1.1 does not require the Owner to file a Claim in order to impose liquidated damages in accordance with the Contract Documents.

#### § 15.1.2 - INTENTIONALLY DELETED.

#### § 15.1.3 Notice of Claims

§ 15.1.3.1 Claims by either the Owner or Contractor, where the condition giving rise to the Claim is first discovered prior to expiration of the period for correction of the Work set forth in Section 12.2.2, shall be initiated by notice to the other party. Claims by either party under this Section 15.1.3.1 shall be initiated within 21 days after occurrence of the event giving rise to such Claim or within 21 days after the claimant first recognizes the condition giving rise to the Claim, whichever is later. The claimant shall use its best efforts to furnish the other party, as expeditiously as possible, with written notice of any Claim, including, without limitation, those in connection with concealed or unknown conditions, once such claim is recognized, and shall cooperate with the party against whom the claim is made in any effort to mitigate the alleged or potential damages, delay, or other adverse consequences arising out of the condition that is cause of such a Claim.

§ 15.1.3.2 Claims by either the Owner or Contractor, where the condition giving rise to the Claim is first discovered after expiration of the period for correction of the Work set forth in Section 12.2.2, shall be initiated by notice to the other party.

#### § 15.1.4 Continuing Contract Performance

§ 15.1.4. Notwithstanding the making of any Claim or the existence of any dispute regarding any Claim, Contractor shall not cause any delay, cessation, or termination in or of Contractor's performance of the Work, but shall diligently proceed with performance of the Work in accordance with the Contract Documents.

#### § 15.1.4.2 INTENTIONALLY DELETED.

#### § 15.1.5 Claims for Additional Cost

If the Contractor wishes to make a Claim for an increase in the Contract Sum, notice as provided herein shall be given before proceeding to execute the portion of the Work that is the subject of the Claim. Prior notice is not required for Claims relating to an emergency endangering life or property arising under Section 10.4. All claims for additions to the Contract Sum shall be made in accordance with the Change Order procedure set forth in Article 7.

### § 15.1.6 Claims for Additional Time

§ 15.1.6.1 If the Contractor wishes to make a Claim for an increase in the Contract Time, notice as provided herein shall be given. The Contractor's Claim shall include an estimate of cost and of probable effect of delay on progress of the Work. In the case of a continuing delay, only one Claim is necessary. All claims for additions to the Contract Time shall be made in accordance with the Change Order procedure set forth in Article 7.

§ 15.1.6.2 If adverse weather conditions are the basis for a Claim for additional time, such Claim shall be documented by data substantiating that weather conditions were abnormal for the period of time (including Contractor's daily job log), could not have been reasonably anticipated, and had an adverse effect on the critical path of the scheduled construction.

§ 15.1.7 INTENTIONALLY DELETED.

### § 15.2 INTENTIONALLY DELETED

Intentionally Deleted

### § 15.3 Mediation

§ 15.3.1 The parties acknowledge that in certain circumstances non-binding mediation may be the most productive and efficient method of resolving a dispute. The parties hereby agree, without binding themselves to choose mediation, to consider in their respective sole discretion, the use of mediation prior to resolving any dispute in accordance with Section 15.4, Arbitration below.

### § 15.4 Arbitration

§ 15.4.1 The parties have selected arbitration as the method for binding dispute resolution in the Agreement, subject to the limitations in Section 15.4.2. Any Claim not resolved by the parties shall be subject to arbitration which, unless the parties mutually agree otherwise, shall be administered by Arbitration Rules and Procedures of JAMS (the "JAMS Rules") currently in effect.

§ 15.4.1.1 A demand for arbitration shall be made within a reasonable time after the claim has arisen, but in no event shall it be made after the date when the institution of legal or equitable proceedings based on the Claim would be barred by the applicable statute of limitations. For statute of limitations purposes, receipt of a written demand for arbitration by the person or entity administering the arbitration shall constitute the institution of legal or equitable proceedings based on the Claim.

§ 15.4.2 The foregoing agreement to arbitrate and other agreements to arbitrate with an additional person or entity duly consented to by parties to the Agreement shall be specifically enforceable under applicable law in any court having jurisdiction thereof. This consent to arbitrate shall not apply (1) when a person or entity necessary or beneficial to the full resolution of the claim cannot be joined in or bound by the arbitration proceeding; or (2) if the amount due in the controversy exceeds fifty thousand dollars (\$50,000). Such claims not subject to arbitration shall be resolved by a court of competent jurisdiction.

§ 15.4.3 The arbitrator or arbitrators shall make an award in writing that is consistent with the terms of this Agreement and the laws of the State of California and that includes findings of fact and a reasoned decision. The award rendered by the arbitrator or arbitrators shall be final, and judgment may be entered upon it in accordance with applicable law in any court having jurisdiction thereof. The foregoing agreement to arbitrate and other agreements to arbitrate with an additional person or entity duly consented to by parties to the Agreement, shall be specifically enforceable under applicable law in any court having jurisdiction thereof.

### § 15.4.4 Consolidation or Joinder

§ 15.4.4.1 Either party may consolidate an arbitration conducted under this Agreement with any other arbitration to which it is a party provided that (1) the arbitration agreement governing the other arbitration permits consolidation, (2) the arbitrations to be consolidated substantially involve common questions of law or fact, (3) the arbitrations employ materially similar procedural rules and methods for selecting arbitrator(s), and (4) such consolidation is consistent with the limitations set forth in Section 15.4.2.

§ 15.4.4.2 Either party may include by joinder persons or entities substantially involved in a common question of law or fact whose presence is required if complete relief is to be accorded in arbitration, provided that the party sought to be joined consents in writing to such joinder. Consent to arbitration involving an additional person or entity shall not constitute consent to arbitration of any claim, dispute or other matter in question not described in the written consent.

§ 15.4.4.3 The Owner and Contractor grant to any person or entity made a party to an arbitration conducted under this Section 15.4, whether by joinder or consolidation, the same rights of joinder and consolidation as those of the Owner and Contractor under this Agreement.





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for a viable economy and  
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## **MEMORANDUM**

Subject: Approval of Mammoth Lakes Housing, Inc. Resolution 23-02  
Approving the Creation of an Executive Director Evaluation  
Process Ad-Hoc Committee to bring recommendations to the  
Board of Directors

Presented by: Patricia Robertson, Executive Director

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## **BACKGROUND**

The Board usually performs the annual evaluation of the Executive Director in the fall, in conjunction with the ED's contract renewal date. The process for this evaluation is typically established by the ad-hoc committee appointed that year.

The last evaluation was performed in the summer/fall of 2022. The ad-hoc committee included Board Members Sarah Nuttall, Tony Perkins, and Brian D'Andrea. The recent committee members thought it would be useful to use their lessons-learned to formulate some recommendations for a more formalized process for the subsequent evaluation in summer/fall 2023.

An ad-hoc committee is not subject to the Brown Act and must disband after the purpose of the committee has been completed.

## **ANALYSIS**

The ad-hoc committee would provide options to the full Board of Directors regarding possible options for the structure of the evaluation process.

## **OPTIONS**

1. Approve Resolution 23-02 creating an Executive Director Evaluation Process Ad-Hoc Committee to bring possible structures to the full Board of Directors for contemplation.
2. Do not approve Resolution 23-02 and do not form the ad-hoc committee for this purpose.

## **ATTACHMENTS**

1. Resolution 23-02



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## **STAFF REPORT**

Subject: Appointment of the members to the Executive Director Evaluation Process Ad-Hoc Committee

Presented by: Patricia Robertson, Executive Director

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## **BACKGROUND**

With the adoption of Resolution 23-02, the MLH Board shall now appoint the nominations committee.

## **ANALYSIS/DISCUSSION**

Staff recommends the Board appoint an ad-hoc committee consisting of no more than four MLH Board members. It is possible that the Board may want to include the Executive Director.

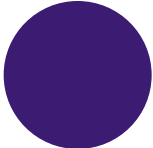
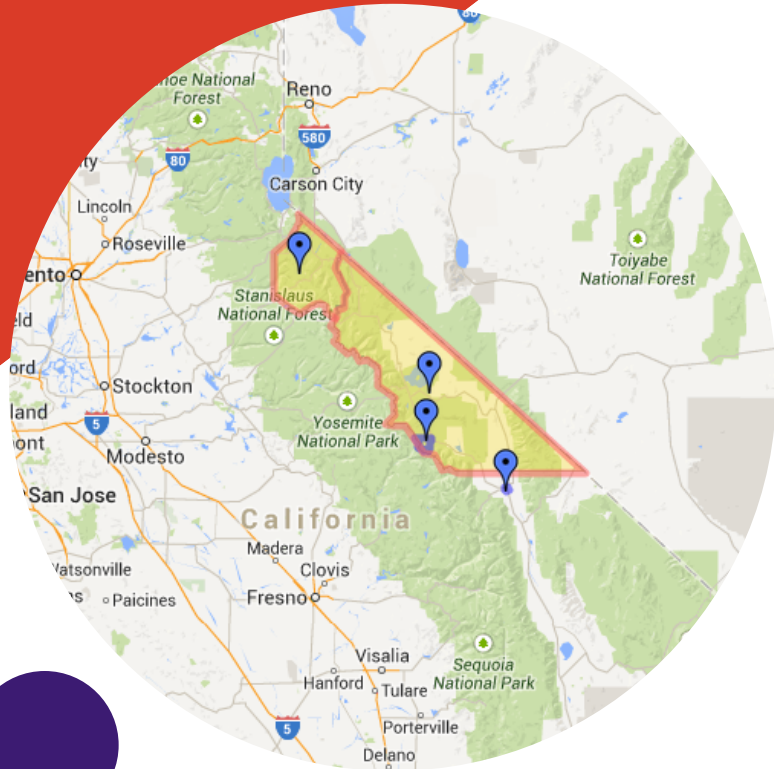
The purpose of the ad-hoc committee is to develop some recommendations regarding the process of the annual Executive Director evaluation, and provide recommendations to the Board of Directors for approval.

## **RECOMMENDATION**

The Board should appoint no more than four members of the Mammoth Lakes Housing Board to serve on the ad-hoc nominations committee.



Serving the rural counties of Inyo, Mono, & Alpine in the Eastern Sierra region of California



## about us

Mammoth Lakes Housing, Inc. is an independent 501(c)3 nonprofit organization providing housing programs and projects to a service area of more than 14,000 square miles and a diverse population of more than 33,000 residents.

Our rural service area encompasses unique topography and includes national monuments and parks, forests, deserts, ski areas, and more.



### Grant Management

We partner with jurisdictions on State & Federal grants for housing projects and program delivery.



### Developer Resource

We provide local resources and knowledge to private housing developers.



### Community Services

We deliver front-line services to the residents of our communities.



*We support community housing for a viable economy and sustainable community.*



# 2021-22 Impact Summary

**\$14.5M**

Grants awarded for housing projects and programs

**\$70k**

Private fundraising dollars for housing projects

**\$582k**

Admin funds from regional partners to grow staff capacity

**108**

New or preserved housing units in the region

**100%**

Growth in staff capacity from 2 to 4 employees

**1**

Remote legal aid station installed at our office





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sustainable community.*

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## **STAFF REPORT**

Subject: Strategic Plan Update proposed process

Presented by: Patricia Robertson, Executive Director

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## **BACKGROUND**

Mammoth Lakes Housing is an independent 501(c)3, not for profit organization led by a nine-member Board of Directors. The organization typically holds a strategic planning retreat every 3-5 years. The last retreat was held in 2019, and previously in 2015.

While a lot of progress has been made to implement the 2019 plan, it is time for the organization to undergo another planning session to update the priorities, and make a plan for the next 3-5 years.

## **ANALYSIS/DISCUSSION**

Staff procured two quotes for this process. One from Rural Communities Assistance Corporation (RCAC) for a two-day in-person planning process for \$23,000; and one from Sean Doherty who now works with the consulting firm Agnew & Beck for a one-day in-person session for \$5,500.

Staff recommends hiring Seana Doherty to facilitate the strategic plan update. The proposal is attached.

The potential dates for the approximately 4-hour meeting are March 22 or March 23. The time is TBD.

## **STAFF RECOMMENDATION**

Staff recommends that the Board discuss and identify potential dates/times for the one in-person session.

## **ATTACHMENTS**

1. Proposal from Seana Doherty



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**STAFF REPORT**

Subject: Committee Updates from various standing and ad-hoc committees  
– *information item*

Presented by: Committees

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<b><u>Governance Committee</u></b> Standing  Kirk, President Jennifer, Vice-President Agnes	<b><u>Diversity, Equity, &amp; Inclusion</u></b> Standing
<b><u>Programs &amp; Housing Development,</u></b> ad-hoc  Tom Jennifer Brian	<b><u>Marketing &amp; Communications</u></b> ad-hoc  Tony Agnes Lindsay
<b><u>Fundraising Committee</u></b> ad-hoc  Heidi Jennifer Brian Lindsay	<b><u>Workforce Housing Committee</u></b> Chamber  Tom



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Subject:

**Board Member Reports**

This is the time set aside during the meeting for reports from individual members of the Board of Directors

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